82-1839

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ZELVERN W. MANN, ADMINISTRATOR OF THE ESTATE OF ADA CREWS MANN, DECEASED, PETITIONER

v.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR UCLA HOSPITAL & CLINICS, ANDREA CRACCHIOLO III M.D., STANLEY CASSAN, M.D., RESPONDENTS;

DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, Lisa Carl sole corporation, HARRINGTON, FOXX, DUBROW & CANTER a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, JUDGE, JOHN COLE, JUDGE, PETER S. SMITH, JUDGE, RESPONDENTS.

CONSOLIDATED FOR HEARING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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of this Court

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May, 1983

QUESTIONS PRESENTED

Mann v. Gold

1. Whether state hospital doctors and administrators acted under color of law, violating decedent's civil rights under Title 42 USCA section 1983, by concealing decedent's broken neck, not treating her neck but keeping her drugged, using state and federal money to experiment on her, damaging her spinal cord so that she died.

2. Whether a patient drugged by a state hospital to conceal her broken neck has the civil rights action of a prisoner under 42 USC §1983.

3. Whether the district and appellate courts can ignore case law, Halet v. Wend, requiring the Court in a Rule 12(b)(1) dismissal motion to take as true the allegations of Petitioner's complaint.

4. Whether the district court on a subject matter jurisdiction question can assess attorney fees without making findings.

5. Whether the appellate court can ignore its own decisions and Supreme Court case law in the district court's opinion in affirming the district court.

6. Whether the Supreme Court case, Polk County v. Dodson, misinterpreted by the district court as controlling jurisdiction in this case, requires not only that certiorari be granted but that this case be remanded to the district court for a trial on the merits.

Mann v. Canter

7. Whether the U. S. Supreme Court decision Polk County v. Dodson modifies this Court's decision in Dennis v. Sparks so as to remove the district court's jurisdiction over private attorneys after the judicial defendants have been granted immunity.

8. Whether a retired judge charged with violation of California Government Code sections 6200, 6201, felonious taking of a

court file from a courthouse to deprive the Petitioner of his civil rights to due process in conspiracy with private attorneys, has any immunity from district court jurisdiction under Dennis v. Sparks.

9. Whether trial and appellate courts can ignore U. S. Supreme Court and Ninth Circuit rulings, as well as federal magistrate ruling in this case of good cause for discovery of third party witnesses.

10. Whether a retired judge appointed as a "special master" is still required to come to a deposition after dismissal on grounds of Dennis v. Sparks "immunity".

11. Whether county judges and a retired judge have absolute judicial immunity justifying Rule 12(b)(1) dismissal without carrying the burden Dennis v. Sparks requires where the complaint alleges private meetings of judges and attorneys to make decisions in advance of court hearings, with subornation

of perjury of court reporter to cover up private meeting with judge in a § 1983 case.

12. Whether district federal trial court and Ninth Circuit appellate court can ignore U. S. Supreme Court and Ninth Circuit rulings and competent evidence presented by Petitioner which created triable issues, then dismiss and affirm dismissal of Petitioner's case under Title 42 U.S.C. section 1983, for deprivation of Petitioner's Constitutional rights.

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RICHARD GOLD, M.D., et al., RESPONDENTS

and

DAVID H. CANTER, etc., et al., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kenneth Crews Mann and Bruce Ogden Mann, Attorneys, on behalf of Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, Deceased, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these consolidated companion cases: Ninth Circuit Nos. 82-5110, Gold and 82-5182, Canter; District Court Nos. CV 81-5461R and CV 81-4689.

OPINIONS BELOW

Neither of the opinions of the Ninth Circuit is reported; neither of the opinions of the Central District Court is reported. The Ninth Circuit opinions bearing the instructions "DO NOT PUBLISH" are attached as APPENDIX A. The orders denying rehearing in banc are attached as APPENDIX B.

JURISDICTION

The memorandum opinions in these consolidated cases were filed November 10, 1982 (APPENDIX A pages 36 through 40.) Petitions for rehearing in banc timely filed by Petitioner were denied by order of the Ninth Circuit Court of Appeals February 10, 1983 (APPENDIX B pages 41 through 42.) The judgments affirming the appeal decisions were served on the District Court and counsel February 22, 1983 (APPENDIX C pages 43 through 46.) Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1, Due Process of Law
>
> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

2. Title 42 U.S.C.A. section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, usage of any State . . . subjects or causes to be subjected, any citizen of the United States, within the jurisdiction of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Within the three-year statute of limitations available to Title 42 USA section 1983 actions in California, Petitioner brought suit in federal court to obtain damages including pain and suffering damages experienced by the decedent which are unavailable in state court but are available in federal court to obtain an enhanced recovery, and an early recovery for the Estate of Ada Crews Mann, deceased. Petitioner, as the duly appointed administrator of decedent's estate had a mandatory duty under California Probate Code sections 573 and 578a to recover estate assets, and pain and suffering damages under the authority of Guyton v. Phillips (1981) 606 F.2d 248, not available in state courts.

Defendants, state hospital doctors acted under color of state law, violating the civil rights of Ada Crews Mann by

conspiracy with state hospital administrator concealing the fact of decedent's broken neck which had occurred November 1, 1977 in a fall in said state hospital, but using state and federal money to experiment on her against her will, keeping her drugged, damaging her spinal cord so that she died March 26, 1979.

The District Court dismissed on defendants' Rule 12(b)(1) motion claiming there was no action by the state hospital doctors and administrator under color of law, that therefore there was no civil rights subject matter jurisdiction. The defendants moved for attorney fees which were granted by the district court without making findings required under Supreme Court decisions and Ninth Circuit decisions, and the Ninth Circuit Court of Appeals affirmed, ignoring both U. S. Supreme Court and Ninth Circuit precedent. Petitioner petitioned the Ninth Circuit Court for rehearing en banc within jurisdictional time limit, but the Ninth

Circuit Court denied the petition for a rehearing en banc on February 10, 1983.

In September, 1981, the Petitioner discovered substantial evidence of civil rights violations taking place against him as administrator of the estate of his deceased wife Ada Crews Mann and his sons, heirs, which included private meetings between certain Los Angeles Superior Court judges, a retired judge Joseph A. Wapner, who had been repeatedly reappointed as a discovery referee by non-judicial acts, over Petitioner's objections, in violation of California Code of Civil Procedure section 638, in violation of Bird v. Superior Court (1980) 112 Cal.App.3d 595, a deprivation of Petitioner's right to due process; these private meetings included judges, Joseph Wapner, and private attorneys to agree in advance to rule in defendants' favor at later court hearings. Petitioner discovered a document on defendant attorneys' paper

which admitted in writing to one of these private meetings of judges and attorneys, and found that the court reporter to the actual hearing had falsified the date of the hearing so as to enable defendant attorneys to claim that the secret meeting with the judge was not secret but that it had taken place with the reporter, that the true hearing date was not reported. By a simple check of the Superior Court register, it was readily learned that the register showed the true hearing date of April 17, 1980, with the reporter named as having reported that date, not the secret meeting of April 16, 1980, the day before the hearing.

Another secret meeting was covered up by defendant Judge Peter Smith by leaving out of his minute order any reference to the fact that in said secret meeting, without notice to Petitioner, he cancelled Petitioner's depositions and agreed to keep original medical records of the decedent in his chambers, denying access to Petitioner.

August 21, 1981, defendant attorneys and Judge Smith were so blatant in their conspiracy that they neglected to have the court reporter discontinue her notes when the regular noticed matters of that date were completed; defendant attorney Lisa Carl began to suggest the judge join with her in taking the original medical records to keep them away from Petitioner's noticed records deposition set for August 31, 1981, which defendants did not attend.

Included in the actions violating the civil rights of the petitioner was Joseph Wapner's secret, felonious taking of the state court file out of the courthouse, keeping it out of sight for over nine months, preventing the case coming to trial.

When defendants cancelled the early trial obtained by Petitioner under California Code of Civil Procedure section 36 in the state court, Petitioner brought suit in the federal court for violation of his civil rights.

Defendants went so far as to suborn perjury of the court reporter to get him to make a false declaration dated December 31, 1981, again lying and claiming the April 17, 1980 hearing was not on April 17, 1980, but on April 16, 1980, so that defendants could cover up their written admission of the secret meeting with the judge. The corrupt actions of the defendants carried over into the federal case, and it was dismissed after the federal court held that with the dismissal of the state judges and retired judge for judicial immunity, the private attorney defendants were not acting under color of law, that the Court had no jurisdiction of the subject matter. The federal court supported that position by claiming the U. S. Supreme Court deciaion Polk County v. Dodson overruled Dennis v. Sparks. The defendants moved twice for attorney fees which were denied by the trial court. Petitioner appealed; the Ninth Circuit affirmed, with rehearing denied on February 10, 1983.

REASONS FOR GRANTING THIS PETITION

1. On petition to the United States Supreme Court, these consolidated cases squarely present questions of action under color of state law: by state hospital doctors and administrator; and by private attorneys in conspiracy with state judges and retired judge, in deprivation of Petitioner's civil rights protected under the Fourteenth Amendment Due Process clause and the Eighth Amendment proscription against cruel and unusual punishment applicable to states under the Fourteenth Amendment. This petition also brings to the attention of this Supreme Court the failure of the district trial court and the Ninth Circuit Court of Appeals to follow not only precedents established by this Supreme Court but Ninth Circuit holdings. Legal authority for granting this petition is: Monroe v. Pape (1961) 365 U.S. 167, 5 L.Ed. 492, 81 S.Ct. 473, in which this court granted a writ of certiorari in an action for violation

of the federal Civil Rights Act, section 1983 of Title 42, because of the seeming conflict in the court of appeals ruling affirming dismissal of the complaint with the United States Supreme Court's prior cases. Willingham v. Morgan (1969) 395 U. S. 402, 23 L.Ed. 396, 89 S.Ct. 1813, in which the Supreme Court granted certiorari to consider whether the court of appeals whose opinion was in apparent conflict with at least three other court of appeals' decisions erroneously decided the removal question with respect to a suit by a federal prisoner against a warden and medical officer at the prison.

Since these cases came before the Supreme Court from a dismissal on jurisdictional grounds, see F.T.C. v. Dean Foods Co. (1966) 384 U.S. 597, 16 L.Ed.2d 802, 86 S.Ct. 1738, which held that the allegations of the Federal Trade Commission's application for a preliminary injunction must be taken as true.

2. On petition to the United States Supreme Court, Mann v. Gold squarely presents this question: Whether state hospital doctors and administrator act under color of state law, within the meaning of 42 USC §1983. Polk County v. Dodson (1981) 454 U.S. 312, 102 S.Ct. 445, at 450, 451, 453, makes an exception for state hospitals and state administrators, leading Petitioner to believe other justices will join Justice Blackmun in his dissent in Polk's state hospital context and find color of law or state action by the state hospital defendant doctors and administrator. Polk County wrestled with the problem of whether state employees act under color of law, and the question is by no means put to rest. For the six-page dissent by Justice Blackmun, one page less than the majority opinion by Justice Powell, awaits only the proper case. Justice Blackmun's dissent fits Petitioner's facts on all fours:

> When a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation, violates a person's constitutional rights, the Court consistently has held that the employee acts "under color of" state law, within the meaning and reach of 42 U.S.C. §1983. Because I conclude that the Court's decision in this case is contrary to its prior rulings on the meaning of "under color of" state law, and because the Court charts new territory by adopting a functional test in determining liability under the statute, I respectfully dissent.
>
> I
>
> The Court holds for the first time today that a government official's "employment relationship" is no more than a "relevant factor" in determining whether he acts under color of state law within the meaning of §1983. *Ante*, at 451.

Polk County v. Dodson, 102 S.Ct. at 455.

Noting that Polk County v. Dodson is a public defender case and not a hospital case, the Ninth Circuit reliance upon it to dispense with the attaching of color of law to the defendant state hospital administrator and doctors is misplaced and misapprehends the law in Polk County v. Dodson, a reason for granting this petition.

3. Petitioner has alleged custodial incarceration and reliance on Estelle v. Gamble (1976) 429 U.S. 97, 50 L.Ed. 251, 97 S.Ct. 285. At 429 U.S. 102, the Court considered the constitutional prohibition of the Eighth Amendment, citing In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed. 519 (1980)("Punishments are cruel when they involve torture or a lingering death . . .").

Petitioner's complaint describes acts of defendants, experimental operations without the consent of decedent while she was drugged (CT 1, p. 11, lines 1-28; CT 1, p. 13, lines 1-28), alleged the conscious conspiracy to kill decedent with intentional acts done for that purpose, acts which weakened decedent to maintain her in defendants' custodial control. Complaint, P. 11, lines 1-28:

> . . . and concealed the broken neck from decedent, from her husband, administrator . . . failed to warn . . . that death was substantially certain to follow.

> . . . Defendants abandoned decedent and refused to treat her broken neck at all times, but did perform numerous operations on her body not related to correction of her broken neck, and did monitor her broken neck, by taking secret cervical x-rays of it during January, 1978, and September, 1978 and charged Medicare over $235,000 for . . . medical procedures not related to correction of her broken neck. . . .
>
> Page 13, lines 1-28, Petitioner's complaint:
>
> . . . So battered her body during September, 1978 . . . without any protection to her neck . . . jostling to her body resulted in further impingement upon the lower brain stem and spinal cord, causing paralysis to Ada Crews Mann; . . . ordered and caused to be administered . . . Demoral and Haldol, breathing depressants, so as to drug her, so as to prevent her communicating her fears and neck pains to the plaintiff . . . defendants and each of them . . . determined to hasten the death of Ada Crews Mann . . .

The U. S. Supreme Court in Estelle continued describing its more recent cases in which it has held that the "[Eighth] Amendment proscribes more than physically barbarous punishments, at page 102 of the Estelle opinion, citing Greg v. Georgia(1976) 428 U.S. 123, 169-173, and other cases:

> The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," *Jackson v. Bishop*, 404 F.2d 571, 579 . . .

The U. S. Supreme Court concluded at page 104 of Estelle:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," *Gregg v. Georgia, supra.*, at 182-183, 96 S.Ct. at 2925 (joint opinion) proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoner's needs . . .

In line with the Estelle opinion, and distinguishing the public defender subject of its opinion from a state hospital, the Court stated in Polk County v. Dodson (1981) 102 S.Ct. 445 at 450:

> Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients. On the contrary, it is his function to protect the interest of the public as well as that of his wards. Similarly, *Estelle* involved a physician who was the medical director of the Texas Department of Corrections and also the chief medical officer of a prison hospital. He saw his patients in a custodial as well as medical capacity.
>
> Because of their custodial and supervisory functions, the State-employed doctors in *O'Connor* and *Estelle* faced their employer in a very different posture than does a public defender.

> Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve.
>
> Polk County v. Dodson, 102 S.Ct. 450.

There is no substantive difference between a jailor and prison doctor killing one of their patients and a state hospital administrator and his state hospital doctors killing one of their public Medicare patients while wrongfully confining her by use of drugs and assaults preventing her leaving the confinement of the hospital while taking steps to insure her death from the broken neck, experimenting upon her body while she is still alive, the "unnecessary and wanton infliction of pain" quoted from Gregg, supra, in Estelle, supra.

If a question of fact exists as to whether or not Ada Crews Mann was confined against her will after her neck was broken, was made a prisoner by drugs, then even on summary judgement that issue could not be decided, but once recognized, requires a trial on the merits.

Although Estelle holds that mere allegations of malpractice do not state a § 1983 claim, it holds that deliberate indifference to serious medical needs does offend evolving standards of decency in violation of the Eighth Amendment. Even more should the deliberate concealment of decedent's broken neck, alleged by Petitioner, offend evolving standards of decency.

Honorable Chief Justice Burger in Specht v. Patterson (1967) 386 U.S. 605, 608, 87 S.Ct. 1209, 1211, 18 L.Ed.2d 326, states:

> There can be no doubt that involuntary commitment to a mental hospital like involuntary confinement of an individual for any reason is a deprivation of liberty which the state cannot accomplish without due process of law.

O'Connor v. Donaldson (1975) 422 U.S. 563, states:

> Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his voluntary confinement was initially permissible it could not constitutionally continue after that basis no longer existed. (*Jackson v. Indiana*, 406 U.S. at 738, 92 S.Ct. at 1858).

Here, after Ada Crews Mann's neck was broken, unnecessary operations performed experimentally on her, and she was drugged to conceal her condition, her confinement could not constitutionally continue, while defendant state doctors and administrator continued to experiment on her while she was dying from the broken neck.

Holmes v. Silver Cross Hospital of Joliet, Illinois (D.C., Ill., 1972) 340 F.Supp. 125 is cited in 14 C.J.S. Civil Rights Supplement, Section 124 Hospitals and Similar Institutions:

> We believe that the initial issue is easily resolved once we have determined that the hospital may be deemed to have been involved in state action. If they acted as agents of the entity charged with state action, the doctors clearly must take upon their shoulders all the responsibilities that their principal possesses, particularly when as here the principal is incapable of executing any action whatsoever except through use of agents. Under this theory therefore, the doctors act under color of state law so far as Section 1983 is concerned, whenever they act under the express direction and as agents of the hospital. When they are so acting they are bound by the same constitutional restraints that are upon the hospital.

Polk County, supra., was limited by this Court to its facts, and this Court recognized the hospital-employee-doctor exception, 102 S.Ct. 451, distinguishing the state hospital doctors of O'Connor and Estelle from the public defender of Polk County.

Furthermore, Ada Crews Mann, drugged, with her malfunctioning hip replacement pulled out of its socket somehow in the state hospital, with her broken neck concealed from her and from Petitioner, had no say whatsoever as to who treated her or for what treatment and was unable to stop the experimentation done by some fifty-six state doctors at this state teaching hospital. Said doctors, as alleged, were paid by public funds from the State and Federal Government for all of the some $235,000 of medical experimentation done on Ada Crews Mann while she lay dying, drugged in their custody and control.

4. This Court's attention is directed to the fact that the district trial court made no findings of fact and conclusions of [6] law detailing the basis for the award of $5,000 in attorney fees against the petitioner for bringing this action, in direct violation of the Supreme Court decision in Hughes v. Rowe (1980) 101 S.Ct. 173, and the Ninth Circuit Court of Appeals holding in Cohn v. Papke (1981) 655 F.2d 191. In Cohn:

> In the event that the trial court in a civil rights action brought under section 1983 decides to grant attorney fees to the defendants, the trial court should make findings of fact and conclusions of law detailing the basis for the decisions.

In Hughes v. Rowe, 499 us at 14:

> The fact that a plaintiff may ultimately lose his case is not in itself a sufficient jusitification for the assessment of fees. As we stated in Christiansburg: . . . Hence a plaintiff should not be assessed his opponents' attorney fees unless a court finds that his claim was frivolous, unreasonable, or groundless or that the plaintiff continued to litigate after it clearly became so; 434 U.S. at 422, 98 S.Ct. at 701.

And at page 16 of Hughes v. Rowe:

[6] See APPENDIX D, docket.

> Allegations that upon careful examination prove legally insufficient to require a trial are not for that reason alone, groundless or without foundation as required by Christianburg.

The District Court made no findings in the Petitioner's case as the record shows. See APPENDIX D, docket in Mann v. Gold.

The Ninth Circuit Court of Appeals in its memorandum opinion affirming the district court decision ignores its own requirement of findings and seems to hold that it is only a matter of discretion at the trial court level, that findings are not needed at all.

It is submitted that the trial judge and the appeals court ignored the reuqirement of this Supreme Court for findings because they knew that they could not justify the $5,000 attorney fees award with findings. In fact, the Blackmun dissent in Polk County shows that the question of state action, acts under color of state law, is a close one, and poor plaintiffs such as Petitioner, believing in the ideals of civil rights and equity juris-

diction of the federal courts to enforce them, are deceived by such reduction of Supreme Court requirements for findings to simply a matter of subjective discretion on the part of the trial judge and appeals court. If that is what Hughes v. Rowe really says, then it is a sorry commentary upon the Constitutional precepts upon which this nation was founded.

5. The district court judge and the Ninth Circuit Appellate Court misapplied Polk County v. Dodson (1981), supra; and ignored: Dennis v. Sparks (1980), 449 U.S. 24, 66 L.Ed.2d 185, 101 S.Ct. 183; Rankin v. Howard (CA 9th 1981) 633 F.2d 844, cert. denied 101 S.Ct. 2020; Beard v. Udall (CA 9th 1981) 648 F.2d 1264; in dismissing private attorney defendants who were in a corrupt conspiracy and symbiotic relationship with the State, Los Angeles Superior Court judge defendants and retired judge,

claiming that after dismissing the judicial defendants, notwithstanding the symbiotic relationship and corrupt conspiracy, the case cannot continue in federal court against the remaining private defendant attorneys, since after dismissal of their judicial conspirators, the private attorneys are not considered to have acted under color of law.

The district judge and Ninth Circuit Court of Appeals misapplied this Supreme Court's decision in Polk County v. Dodson, supra., a case which does not apply to private attorneys in a Dennis v. Sparks conspiracy, and denied Petitioner all discovery in derogation of rights sustained by this Court in Dennis v. Sparks and discovery allowed in all federal cases of third-party witnesses.

Beard v. Udall (CA 9th 1981), supra, holds:

> This [Rankin] conclusion[1] followed from the fact that a party expects judicial impartiality in dealing with a judge; thus, if a judge connives with one of the parties to predetermine the outcome of a judicial proceeding, the other parties' expectations are frustrated. Moreover, the court noted an agreement by a judge to predetermine the outcome of a proceeding is 'not a function normally performed by a judge.' Id. Even though the judge's disposition of the proceeding remains a judicial act, under Rankin the prior agreement is deemed the essential cause of any deprivation of federally protected rights. Accordingly, the judge may be liable for damages due to the deprivation. Id. at [633 F.2d] 847-48 and n.9.

Also, see footnote 6 in Beard v. Udall:

> . . . The fact that Stump involved only allegations of wrongful acts taking place in the courtroom, while Rankin involved alleged activity outside the courtroom is one ground for distinguishing the results in the two cases. However, even activity that takes place in a courtroom can sometimes be considered non-judicial. See e.g. Gregory v. Thompson 500 F.2d 59, 63 (CA 9) (judge does not enjoy immunity for assault committed in courtroom). See also Zarcone v. Perry 572 F.2d 52 (CA 2nd 1978).

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[1]The Ninth Circuit Court of Appeals held in Rankin v. Howard (1981) 633 F.2d 844 that a judge does not enjoy judicial immunity if the judge's actions were either non-judicial or taken in clear absence of all jurisdiction.

All arguments that judicial immunity carries over to private attorneys corruptly conspiring with the judicial defendants are met by the rule in Dennis v. Sparks, supra, that state action can be found on the part of private attorneys even though the state official involved is immune from damages. At 449 U.S. 27, 101 S.Ct. 186, the reason for granting the petition for certiorari is given,[2] then the reason for reversal of the court below:

> As the court of appeals correctly understood our cases to hold, to act under color of state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons jointly engaged with state officials in the challenged action, are acting "under color of law" for purposes of § 1983 actions. [citations]

It is significant that the facts of Petitioner's case are parallel to those of Dennis. Addition-

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[2] "Because the judgment below was inconsistent with the rulings of other courts of appeal and involves an important issue, we granted the petition for certiorari. 445 U.S. 942, 100 S.Ct. 1336, 68 L.Ed.2d 775. We now affirm.

ally, there are Rankin agreements, as defined in Beard v. Udall, supra, and footnote 9, that the prior agreement is deemed the essential cause of any deprivation of federally protected rights; that accordingly the judge may be liable for damages due to the deprivation.

In Petitioner's case, the Ninth Circuit Court of Appeals and the district judge ignored the non-judicial prior agreements not only alleged but proved by direct and circumstantial evidence, looking only at the later judicial act. Petitioner's right of action under 42 U.S.C. § 1983, established by Rankin and supported by Dennis was completely ignored by the courts below. They also ignored the right to discovery established by Dennis.

6. Magistrate Kronenberg ruled October 30, 1981 (APPENDIX E) that Petitioner had good cause to depose referee Joseph A. Wapner and Deputy County Clerks who could establish the felonious taking by retired, former presiding judge Wapner

of the court file, a non-judicial, corrupt and criminal act. Wapner's stealing and keeping the case file of Mann v. Cracchiolo, NWC 76789, for over nine months prevented Petitioner, then aged 75, taking his case to trial; this corrupt act was by prior agreement with defendant attorneys. Wapner's stealing the file violated California Government Code sections 6200 and 6201, having the same result as the corrupt injunction caused by bribery in Dennis.

In Dennis, this Court ruled discovery proper,[3] as Magistrate Kronenberg of the district court ruled; but Judge Manuel Real overruled Magistrate Kronenberg, and the Ninth Circuit, ignoring Dennis, affirmed this denial of Petitioner's discovery.

7. The district court and the Ninth Circuit Court of Appeals ignored the non-judicial prior agreements, not only alleged but proved by direct and circumstantial evidence, looking only at the

[3] The Supreme Court held that although a judge might be immune from damages he could be called to testify about his judicial conduct in third party litigation. 101 S.Ct. at 188, 449 U.S. at 30.

later judicial act. The courts below completely ignored Petitioner's right of action under 42 U.S.C. § 1983, established by Rankin and supported by Dennis.

7.a. Petitioner has a written admission against interest of defendant attorneys to a secret prior meeting with Judge John Cole on April 16, 1980, where they persuaded him to agree to rule against Petitioner at the later court hearing April 17, 1980, which he did. By suborning perjury of the court reporter, defendant attorneys caused him to date the notes of the court hearing of April 17, 1980 as April 16, 1980[4] trying to cover their written admission of their secret meeting with Judge Cole. It was the secret prior meeting of April 16, 1980 where defendant attorneys persuaded Judge Cole to rule for them that was the violation of Petitioner's constitutional rights that was a non-judicial act under Rankin.

---

[4]Kenneth Crews Mann, attorney for Petitioner, proved in the district court to Judge Real that he could not have been in the Los Angeles Superior Court April 16, 1980 because he was 25 miles away at a deposition in Revere vs. Sir Speedy. Judge Cole did not deny 4/16/80 meeting. *Also see APPENDIX F, state register for 4/17/80.*

7.b. A $1,000 bribe was paid to Joseph Wapner on or about July 27, 1981. In an attempt to cover the payment, Mr. Wapner stepped outside of any claim to immunity as a referee by calling Petitioner's attorney's law office, acting as a defendant attorney, complaining that K. C. Mann and his secretary were liars, that the wife of K. C. Mann could not understand English.[5] The petitioner had completed a deposition in December, 1979 and was in Northern California on vacation; his unilaterally scheduled deposition for July 31, 1981, then for July 27, 1981, was cancelled, due to his absence, as Mr. Wapner admitted to Mrs. Mann on the telephone. But defendant attorneys and retired judge Wapner had agreed in advance of July 27, 1981 to pretend they were going to have a deposition anyway as a way of covering the payment to Joseph Wapner.

---

[5]Dragon Deposition Service recorded the telephone conversation in which Joseph Wapner admitted he had cancelled the July 27, 1981 deposition. Mrs. Mann told him the telegram saying depositions would go forward was "ambiguous" whereupon Joseph Wapner said, "**Maybe you can't read English.**" (Mrs. Mann has a Master's of Arts degree in English.)

7.c. On August 21, 1981 Judge Peter Smith corruptly agreed after a noticed hearing had concluded and the court reporter continued to take notes, with defendant attorney Lisa Carl to deprive Petitioner of original medical records he had subpoenaed for a deposition. Judge Smith told Lisa Carl to bring the records to him. She did; she did not come to the medical records deposition of August 31, 1981. Judge Smith tried to cover his corrupt act of August 21, 1981 by not having any reference to it in the minute order for that day. If it had not been for the court reporter's transcript, Petitioner might never have discovered this corrupt act.

7.d. By a prior out-of-court agreement, another non-judicial act, "referee" Wapner agreed with attorney David Canter and Lisa Carl to lie to Presiding Judge Eagleson of the Los Angeles Superior Court, claiming Petitioner's attorney had assaulted Lisa Carl on August 27, 1981 at the attorney's deposition. Whereas, the reporter transcript of the deposition involved

showed that, on the contrary, the assault was done by David Canter upon Kenneth Crews Mann, Petitioner's attorney. Further evidence adduced to the district court showed that at an earlier time, when Joseph Wapner and Lisa Carl had a chance to make the claim about the assault with the presiding judge on the telephone August 27, 1981, they did not mention it. The lie was corruptly agreed to between them and used on August 28, 1981 in Los Angeles Superior Court to try to gain further advantage in the state action, Mann v. Cracchiolo, NWC 76789.

7.d. On August 31, 1981, an in-chambers agreement was made between Lisa Carl and "referee" Wapner after Petitioner's attorney Kenneth Crews Mann had left the court after waiting for thirty minutes for a deposition which defendants refused to start. Then, on their corrupt prior agreement, they caused their court reporter to prepare a false record discussing the case, out of Petitioner's presence, perjuring themselves. The transcript

of that corrupt hearing was in evidence, and affidavits from Petitioner's witnesses raised triable issues of fact.

7.e. Other corrupt acts of defendant attorneys and judges were: (1) The second autopsy on the neck bones of Petitioner's decedent, with no notice to Petitioner, in June, 1981. This autopsy was arranged in secret meetings between Joseph Wapner, Judge Peter Smith, and defendant attorneys. Petitioner only learned this second, secret autopsy had taken place four months later, on reading defendant attorneys' cost bill. (2) Defendant attorneys and Joseph Wapner agreed outside of court to hold an important deposition of Petitioner's expert four hours before the scheduled time, so that Petitioner would not come to the deposition prior to it being adjourned, depriving Petitioner of his right of cross-examination and rehabilitation. Later, defendant attorneys misrepresented to the state court what had been said at that deposition of Petitioner's expert witness.

8. The Supreme Court has held in Saunders v. Shaw (1917) 37 S.Ct. 638, 244 U.S. 317, 61 L.Ed. 1163:

> State procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process.

The allegations of Petitioner's federal complaint in Mann v. Canter, filed in September, 1981, show how Petitioner's due process rights were repeatedly violated by State court procedural rulings.

9. The district court dismissed both Mann v. Gold and Mann v. Canter after weighing the evidence in violation of legal principles requiring a trial where triable issues exist. Further evidence of the conflict in the Ninth Circuit is the recent case of Whiteside v. State of Washington (D.C. Wash., 1982) 534 F.Supp. 774, holding that a judge may not enjoy immunity of his actions were taken either in clear absence of all juris-

diction or if his acts were non-judicial in nature. But Judge Manuel Real evidenced a complete misapprehension of the issues in Petitioner's cases, confusing the facts and the cases, claiming that Petitioner was suing the private attorney defendants for legal malpractice and that Polk County v. Dodson prevented this. Then Judge Real of the federal district court dismissed both cases under Federal Rule of Civil Procedure Rule 12(b)(1) for lack of subject matter jurisdiction. The Ninth Circuit affirmed, ignoring its own holding in Halet v. Wend (CA 9th 1982) 672 F.2d 1305, which requires the Appeals Court and the trial court to take as true, the allegations of plaintiff's complaint on a Rule 12(b)(1) dismissal:

> On a motion to dismiss, the court presumes that the facts alleged by plaintiff are true.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted May 10, 1983. KENNETH CREWS MANN, ATTORNEY
Member of the Bar of this Court

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SELVERN W. MANN, Plaintiff-Appellant, vs. RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D., Defendants-Appellees.	NO. 82-5110 D.C. NO. CV 81-5461 R MEMORANDUM

Submitted -- November 3, 1982

Appeal from the United States District Court
for the Central District of California
Honorable Manuel Real, District Judge, Presiding

Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

The appellant is the administrator of his wife's estate. The decedent allegedly died as a result of mistreatment and neglect by the staff of UCLA Hospital. Appellant brought a state court action for medical malpractice, which resulted in a summary judgment in favor of the defendants. Appellant then brought this action under 42 U.S.C. § 1983. The district court dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The district court also awarded attorney's fees to the defendants. We affirm the dismissal on jurisdictional grounds and the award of attorney's fees.

APPENDIX A

Appellant contends that the district court erred in concluding that the defendant did not act under color of state law. Appellant's contention reduces to this: The defendants acted under color of state law because they were state employees. This precise contention was recently rejected by the Supreme Court in Polk County v. Dodson, 102 S.Ct. 445 (1981). Appellant's reliance on Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975) is misplaced. In both of those cases, the state hospitals were custodial.

42 U.S.C. § 1988 allows a district court, in its discretion, to grant a reasonable attorney's fee to the "prevailing party" in a section 1983 case. In Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Supreme Court held that a defendant may recover his attorney's fees from the plaintiff only if the district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. Applying this standard, the district court was within its discretion in granting attorney's fees in this case.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 09 1992

PHILLIP B. WINEBERRY
CLERK, U.S. COURT OF APPEALS

ZELVERN W. MANN, Administrator of the Estate of ADA CRESS MANN, deceased, Appellant, v. RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D., Appellees.	No. 82-5110 D.C. No. CV 81-5461 R O R D E R

The memorandum disposition in the above-entitled case is amended by changing that portion of the caption relating to the appellant to read:

ZELVERN W. MANN, Administrator of the Estate of ADA CRESS MANN, deceased,

Appellant,

The remainder of the caption remains as in the original.

38

APPENDIX A

NOV 12 1982

DO NOT PUBLISH

FILED

NOV 10 1982

PHILLIP B. WINSERR
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZELVERN W. MANN,	NOS. 82-5182
Plaintiff-Appellant,	82-5195
	D.C. NO.
vs.	
DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON, FOXX, DEBROW & CANTER, a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, judge, JOHN COLE, judge, ELI CHERNOW, judge, PETER S. SMITH, judge,	MEMORANDUM
Defendants- Appellees.	

Submitted -- November 3, 1982

Appeal from the United States District Court
For the Central District of California
Honorable Manuel Real, District Judge Presiding

Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

Appellant is the administrator of his deceased wife's estate. Appellant brought suit in the state court for wrongful death due to medical malpractice, which concluded in a summary judgment in favor of the defendants. Appellant filed suit in the federal court pursuant to 42 U.S.C. § 1983, alleging that various state court judges, a retired state court judge acting as a discovery referee, the state court defendants' lawyers and their law firm conspired to wreck appellant's state court action. The judicial defendants, including the discovery referee, were dismissed on the basis of judicial immunity. The attorney defendants were

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APPENDIX A

granted summary judgment and a dismissal on the basis that they did not act under color of state law. The district court properly dismissed the judicial defendants and granted summary judgment in favor of the attorney defendants, and we therefore affirm the judgment of the district court.

Judges are entitled to absolute immunity against § 1983 suits so long as they perform judicial acts and do not act in clear absence of all jurisdiction. Dennis v. Sparks, 449 U.S. 24 (1980), Stump v. Sparkman, 435 U.S. 349 (1978). The discovery referee is also immune when acting as an aide to a judge and performing judicial acts in place of the judge. Gravel v. United States, 408 U.S. 606 (1972).

Rule 56(e) of the Federal Rules of Civil Procedure provides that when a motion for summary judgment is supported by affidavits, plaintiff may not rest upon the mere allegations of his pleading, but must respond with affidavits or otherwise setting forth specific facts showing that there is a genuine issue for trial. The attorney defendants specifically denied any bribery, conspiracy, concealment, or secret meetings. For the most part, appellant has not responded at all to these specific denials. Where appellant has responded by affidavit, he has used facts beyond the affiant's personal knowledge or otherwise incompetent or inadmissible matters. The district court properly concluded that there were no triable issues of fact.

Federal Rules of Civil Procedure 56(f) allows a judge discretion to order a continuance of a motion for a summary judgment while depositions are taken. However, the district judge was within his discretion in refusing discovery prior to granting summary judgment in this case where it is difficult to envision how the depositions requested would have yielded any admissible evidence which would have contradicted the specific denials of the attorney defendants.

40 A

Appellees' motion for damages and double costs pursuant to Federal Rules of Appellate Procedure No. 38 is granted because the appeal is frivolous. Appellees are awarded double costs plus damages in the amount of $500.

The judgment of the district court is AFFIRMED.

40B

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APPENDIX B

FILED

FEB 10 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased,

Appellant,

v.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D.,

Appellees.

No. 82-5110

D.C. No. CV 81-5461 R

O R D E R

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judge

APPENDIX B

FILED

FEB 14 1983

PHILLIP B. WINDSOR
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased,	)	Nos. 82-5182
	)	82-5195
Appellant,	)	
v.	)	O R D E R
DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON, FOXX, DEBROW & CANTER, a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, judge, JOHN COLE, judge, ELI CHERNOW, judge, PETER S. SMITH, judge,	)	
Appellees.	)	

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Robert Boochever

United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZELVERN W. MANN, Administrator of the Estate of Ada Crews Mann, deceased

Plaintiff(s)

vs

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADM., ETC., ET AL.

Defendant(s)

CASE NUMBER

CV 81-3461 MLR

FILED

FEB 22 1983

NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS (CIVIL)

To:

Kenneth Crews Mann, Esq.
P.O. Box 116
Van Nuys, CA. 91408

Patty Mortl, Esq.
HARRINGTON, FOXX, DUBROW & CANTER
One Wilshire Building
Los Angeles, CA. 90017

Bruce Ogden Mann, Esq.
25231 Paseo de Alicia
Laguna Hills, CA. 92653

PLEASE TAKE NOTICE that the judgment of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on March 28, 1983 at 10:00 A.M. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 14, United States Courthouse, 312 N. Spring Street, Los Angeles, California. It will not be necessary for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: FEBRUARY 22, 1983

By: Deputy Clerk

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Cfv 42 (11/76) NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS

APPENDIX C

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased,

Plaintiff/Appellant,

vs.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D. BERNARD STROHM, ADMINISTRATOR, etc., et al.,

Defendants/Appellees.

FEB 1[illegible] 1983

No. 82-5110

DC CV.81-5461 MLR

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
Clerk of Court
by: [signature]
Deputy Clerk

Filed and entered November 09, 1982

44

APPENDIX C

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APPENDIX C

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEB 14 1983

ZELVERN W. MANN,

Plaintiff-Appellant,

vs.

DAVID H. CANTER, et al.,

Defendants-Appellees.

No. 82-5182
82-5195

D.C.# CV 81-4689 MLRL

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED

A TRUE COPY
ATTEST
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
Clerk of Court
by: Billy Miller
Deputy Clerk

Filed and entered NOVEMBER 10, 1982

45

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED

LVERN W. MANN Plaintiff(s) vs VID H. CANTER, ET AL., Defendant(s)	CASE NUMBER FEB 22 1983 CV 81-4689 MRI NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS (CIVIL)

To: Kenneth Crews Mann, Esq.
P.O. Box 116
Van Nuys, CA. 91408

Patty Mortle, Esq.
HARRINGTON, FOXX, DUBROW & CANTER
624 S. Grand Ave,
Ste. 703
Los Angeles, CA. 90017

Bruce Ogden Mann, Esq.
25231 Paseo De Alicia
Laguna Hills, CA. 92653

Lester J. Tolnai, Esq.
Deputy County Counsel
648 Hall of Administration
500 W. Temple St.
Los Angeles, CA. 90012

PLEASE TAKE NOTICE that the judgment of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on March 28, 1983 at 10:00 A.M. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 14, United States Courthouse, 312 N. Spring Street, Los Angeles, California. It will not be necessary for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: FEBRUARY 22, 1983

By: _____
Deputy Clerk

46

OFF.	YR.	DOCKET NUMBER	FILING DATE MO. DAY YR.	J	N/S	D / R	$ DEMAND (nearest $1,000)	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	YR.	DOCKET NUMBER
								7316				

TITLE:

CAUSE:

VERN W. MANN, Administrator
the Estate of Ada Crews Mann,
eased,

Plaintiff,

HARD GOLD, M.D., JOSHUA LEVY,
., JOHN CARLSON, M.D., BERNARD
OIM, ADMINISTRATOR U.C.L.A.
PITAL AND CLINICS; ANDREA
CCHIOLO III, M.D., STANLEY
GAN, M.D.,

Defendants.

91401

Kenneth Crews Mann
P.O. Box 116
Van Nuys 91408

D

CHECK HERE IF WAS IN THIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				85 47	
				86	

APPENDIX D

D STATES DISTRICT COURT DOCKET

DC 111 (Rev. 7/80)

CV81-5461-R/AWT(Rx) Z.W. MANN vs R. GOLD, M.D., et al

10/22/81 kmb 1. Fld Cmplt. Issd summs.
Case may be referred to Mag Tassopulos for discvry.

11/12/81 cm 2. Fld ORD(R,AWT) transfrng actn to Manuel Real for all fur proceedings cc parties.

11-16-81 sb 3. Fld deft notc of motn & mton to dism actn retble 12-7-81 10am

11-18-81 sb 4. Fld retn summ serv to Stanley Cassan on 10-28-81
5. Fld retn summs serv to John Carlson M.D. on 11-5-81
6. Fld retn summs serv to Andrea Cracchiolo II M.D. on 11-9-81
7. Fld retn summs serv to Joshua Levy M.D. on 10-29-81
8. Fld retn summs serv to Richard Gold M.D. on 10-29-81
9. Fld retn summs serv to Bernard Strohm on 10-28-81

11-30-81 sb 10. Fld pltf opp to motn of deft to dism under Rule 12(b)(6) declar of cu dcft

12-3-81 sb 11. Fld deft reply to memo of P/A in suppt of motn to dism

12-7-81 sb 12. MIN ORD: crt grants the motn w/prej as to dism

12-10-81 sb LODGED ORD OF DISM

12-15-81 sb 13. Fld ORD(MLR) Dism actn w/prej (ENT12-17-81) MD JD & fld copy & notc

12-22-81 sb 14. Fld pltf/deft's BILL OF COSTS Retble 12-28-81 9am

12-22-81 sb 15. Fld deft notc of motn & motn to recvr atty fees' retble 1-18-82 10am

12-29-81 sb 16. Fld pltf opp to motn fr atty fees declar , P/A & exh

1-7-82 ew 17. Fld pltf's NOTC OF APPEAL to 9th Cir. C/A frm jdgmnt ent 12-17-81. $70.00 fldng & docket fees pd.

1-8-82 sb 18. Fld deft reply ot memo of P/A in suppt of motn recvr atty fees

1-11-82 sb 19. Fld supplemtnal reply to def mistaken Factual Statmnr contained in daft reply re atty fees
20. Fld pltf not cof change of mailing address fr all legal docs

1-19-82 gh 21. MIN ORD: deft motn recvr atty fess: crt granted deft motn & stay actn pening appeal

1-21-82 sb LODGED PROP ORD

1-18-82 sb 22. Fld pltf Transcript designation & ord form copy of record

1-25-82 sb 23. Fld ORD(R) deft motn to recvr atty fees in the amount of $4,972.00 granted award atty fees be stayed pending appeal

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 81 4689 WMB (Kx) Date Oct 30, 1981

Title Zelvern Mann et al. vs. David Canter, et al

DOCKET ENTRY

PRESENT:

HON. JOHN R. KRONENBERG, MAGISTRATE

Joyce Zenon
Deputy Clerk

Tape 660B/661A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Kenneth Mann
Bruce Mann

ATTORNEYS PRESENT FOR DEFENDANTS:

Patty Mortl
David Canter

PROCEEDINGS: DEFENDANT'S EX PARTE APPLICATION & MOTION FOR ORDER SHORTENING TIME TO REFER DEPOSITION TO A MASTER.

Court and counsel confer. Court grants defendant's motion for order shortening time however, denies motion for appointment of a master at this time. Good cause is not shown. The Court further orders that all requests for discovery shall, specify in addition to the matters required to be noticed by rules, who is to be present at the time deposition is taken and who will report it.

PROCEEDINGS: PLAINTIFF'S EX PARTE APPLICATION FOR AN ORDER FOR ATTACHMENT OF WITNESS FAILING TO ATTEND FOR TAKING OF DEPOSITION

The deposition of Lynn Stricklin is reset to Nov. 4, 1981 at 9:00 a.m. at 15760 Ventura Blvd., 10th floor, Encino, Calif. Those present should be Kenneth Mann, Bruce Mann, the deposing officer of David Izen & Associates. Other parties may be present with counsel and one or more of the parties, jointly, are permitted to have present 1 additional reporter to record proceedings. The above order pertains to the deposition of L. Stricklin to be held on 11/4/81, Joe Wapner, to be held on 11/6/81, Cleo Phelps and John Walker both to be held on 11/5/81.

All applications for fees or sanctions are denied at this time without prejudice.

Initials of Deputy Clerk

MINUTES FORM 11
CIVIL—GEN

APPENDIX E

6789

SUPERIOR COURT OF LOS ANGELES COUNTY

REPORTS: 2/4

L Sestero 4/3/80 Quit Aileen 10/3/80, 11/20/80

YEAR	MONTH	DAY		FILED DOC	FEES
80	Apr	3	Deft - G. Vaccarella III M.D. not eff. Mot to compel further ans. 4-17-80 9:00am D84		
80	Apr	17	Court makes no [illegible] [illegible] to [illegible] + [illegible] D84 Judge Wagner [illegible] D84		
80	Apr	11	[illegible]		
80	Apr	23	[illegible]	✓	
80	Jun	30	Pltfs Amended to Comp (2)	✓	
80	Jul	11	[illegible]	✓	
80	Jul	1	[illegible]	✓	
80	Jul	30	Deft Stat by Zic C. [illegible] Ruth [illegible] [illegible] by [illegible] on Demurrer, Demurrer to Comp 8-14-80 9AM Dept 84 (Unresolved)		50.00
80	Jul	30	Deft [illegible] 8-14-80 9AM Dept 84		
80	Aug	14	[illegible] court [illegible] D84		
80	Aug	22	[illegible]		
80	Sep	2	[illegible] MO [illegible] MO [illegible] to [illegible] [illegible] 9-30-80 900 D84	✓	
80	Sept	5	[illegible] deft [illegible]	✓	
80	Sept	20	[illegible] of Kenneth Crews Mann + Bruce Ogden Mann response to ans		
80	Sep	30	[illegible] 10-21-80 9 am D84		
80	Oct	21	[illegible] D84		
80	Oct	22	[illegible] 11-20-80 9 am D84		
80	10	17	[illegible] Demurrer of Deft estate - hearing [illegible]	✓	
80	Oct	30	Pltfs Affidavit in support of [illegible]		
80	Nov	7	Deft [illegible] Summary Judgt 12-3-80 9Am Dept 84		
80	Nov	12	[illegible] 12-3-80 900 D80		
80	Nov	12	[illegible]	✓	
80	Nov	17	[illegible] Proof of Service (2)	✓	
80	Nov	20	[illegible] D80		
80	Nov	21	[illegible] D80		
80	Dec	3	[illegible] D80		
80	Dec	3	[illegible] D84		
80	[illegible]	11	[illegible]		
80	[illegible]	18	[illegible]	✓	
80	[illegible]	22	[illegible]	✓	
80	Oct	16	[illegible] 170(5)		

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No._____

ZELVERN W. MANN vs. RICHARD GOLD, etc. and Administrator, etc. vs. DAVID H. CANTER

The Clerk will enter my appearance as Counsel of Record for Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, who in this Court is the Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Kenneth Crews Mann

Kenneth Crews Mann,
Attorney at Law
14542 Ventura Blvd., Suite 208A
Post Office Box 5350
Sherman Oaks, California 91413

Phone: (213) 906-2266

PROOF OF SERVICE

[F.R.C.P. Rules 19.3, 28.3]

I, Kenneth Crews Mann, one of the counsel of record for Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, hereby certify that, on the 10th day of May, 1983, I served one copy of the Petition for Writ of Certiorari on each of the two attorneys of record for the several parties thereto, as follows:

1. On the defendant doctors, Gold, et al., and the defendant attorneys Canter, et al., by mailing one copy in a duly addressed envelope, with first class postage prepaid to: Harrington, Foxx, Dubrow & Canter, One Wilshire Bldg., 7th Floor, Los Angeles, California 90017;

2. On the defendant state court judges and retired judge Wapner, by mailing one copy in a duly addressed envelope, with first class postage prepaid to: John Larson, County Counsel, Room 648 Hall of Administration, 500 West Temple, Los Angeles, CA 90012.

It is further certified that all parties required to be served have been served, and that the list of such parties is set forth in the caption of the Petition.

Kenneth Crews Mann

Kenneth Crews Mann, Attorney
P.O. Box 5350, Sherman Oaks, CA 91413

82-1839

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ZELVERN W. MANN, ADMINISTRATOR OF THE ESTATE OF ADA CREWS MANN, DECEASED, PETITIONER

V.

RICHARD GOLD, M.D., et al., RESPONDENTS,

DAVID H. CANTER, etc., et al, RESPONDENTS;

CONSOLIDATED FOR HEARING

APPENDIX PAGES (RECOPIED, TYPEWRITTEN, PER PHONE INSTRUCTIONS OF EDWARD C. SHADE, DEPUTY CLERK) FOR ATTACHMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kenneth Crews Mann
Attorney at Law
Member of the Bar
of this Court
P. O. Box 5350
Sherman Oaks, CA 91413
(213) 906-2266

May, 1983 ATTORNEY FOR PETITIONER

C O P Y

RECEIVED
NOV 12 1982
Harrington, Foxx,
Dubrow & Canter

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FILED
NOV 10 1982
FOR THE NINTH CIRCUIT PHILLIP B. WINBERRY

ZELVERN W. MANN, Plaintiff-Appellant, vs. RICHARD GOLD, M.D, JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D., Defendants-Appellees.	NO. 82-5110 D.C. NO. CV 81-5461 R MEMORANDUM

Submitted -- November 3, 1982

Appeal from the United States District Court
for the Central District of California
Honorable Manuel Real, District Judge, Presiding

Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

The appellant is the administrator of his wife's estate. The decedent allegedly died as a result of mistreatment and neglect by the staff of UCLA Hospital. Appellant brought a state court action for medical malpractice, which

resulted in a summary judgment in favor of the defendants. Appellant then brought this action under 42 U.S.C. § 1983. The district court dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The district court also awarded attorney's fees to the defendants. We affirm the dismissal on jurisdictional grounds and the award of attorney's fees.

Appellant contends that the district court erred in concluding that the defendant did not act under color of state law. Appellant's contention reduces to this: The defendants acted under color of state law because they were state employees. This precise contention was recently rejected by the Supreme Court in Polk County v. Dodson, 102 S.Ct. 445 (1981). Appellant's reliance on Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975) is misplaced. In both of these cases,

the state hospitals were custodial.

42 U.S.C. § 1988 allows a district court, in its discretion, to grant a reasonable attorney's fee to the "prevailing party" in a section 1983 case. In Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Supreme Court held that a defendant may recover his attorney's fees from the plaintiff only if the district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. Applying this standard, the district court was within its discretion in granting attorney's fees in this case.

The judgment of the district court is AFFIRMED.

COPY

FILED

DEC 06 1982

PHILLIP B. WINBERRY
Clerk, U. S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased, Appellant, v. RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D., Appellees.	No. 82-5110 D.C. No. CV 81-5461 R O R D E R

The memorandum disposition in the above-entitled case is amended by changing that portion of the caption relating to the appellant to read:

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased,

Appellant,

The remainder of the caption remains as in the original.

C O P Y

DO NOT PUBLISH

FILED

NOV 10 1982

PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZELVERN W. MANN, Plaintiff-Appellant, vs. DAVID CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON FOXX, DUBROW & CANTER, a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, judge, ELI CHERNOW, judge, PETER S. SMITH, judge, Defendants-Appellees.	NOS. 82-5182 82-5195 D.C. NO. MEMORANDUM

Submitted -- November 3, 1982

Appeal from the United States District Court
For the Central District of California
Honorable Manuel Real, District Judge Presiding

Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

Appellant is the administrator of his deceased wife's estate. Appellant brought suit in the state court for wrongful death due to medical

malpractice, which concluded in a summary judgment in favor of the defendants. Appellant filed suit in the federal court pursuant to 42 U.S.C. § 1983, alleging that various state court judges, a retired state court judge acting as a discovery referee, the state court defendants' lawyers and their law firm conspired to wreck appellant's state court action. The judicial defendants, including the discovery referee, were dismissed on the basis of judicial immunity. The attorney defendants were granted summary judgment and a dismissal on the basis that they did not act under color of state law. The district court properly dismissed the judicial defendants and granted summary judgment in favor of the attorney defendants, and we therefore affirm the judgment of the district court.

Judges are entitled to absolute immunity against § 1983 suits so long as they perform judicial acts and do not act in clear absence

of all jurisdiction. Dennis v. Sparks, 449 U.S. 24 (1980), Stump v. Sparkman, 435 U.S. 349 (1978). The discovery referee is also immune when acting as an aide to a judge and performing judicial acts in place of the judge. Gravel v. United States, 408 U.S. 606 (1972).

Rule 56(e) of the Federal Rules of Civil Procedure provides that when a motion for summary judgment is supported by affidavits, plaintiff may not rest upon the mere allegations of his pleading, but must respond with affidavits or otherwise setting forth specific facts showing that there is a genuine issue for trial. The attorney defendants specifically denied any bribery, conspiracy, concealment, or secret meetings. For the most part, appellant has not responded at all to these specific denials. Where appellant has responded by affidavit, he has used facts beyond the affiant's personal knowledge or otherwise incompetent or inadmissible matters. The

district court properly concluded that there were no triable issues of fact.

Federal Rules of Civil Procedure 56(f) allows a judge discretion to order a continuance of a motion for a summary judgment while depositions are taken. However, the district judge was within his discretion in refusing discovery prior to granting summary judgment in this case where it is difficult to envision how the depositions requested would have yielded any admissible evidence which would have contradicted the specific denials of the attorney defendants.

Appellees' motion for deamages and double costs pursuant to Federal Rules of Appellate Procedure No. 38 is granted because the appeal is frivolous. Appellees are awarded double costs plus damages in the amount of $500.

The judgment of the district court is AFFIRMED.

COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 10 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

ZELVERN W. MANN, Administrator of the Estate of Ada Crews Mann, deceased, Appellant, v. RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR, UCLA HOSPITAL AND CLINICS, ANDREA CRACCHIOLO III, M.D., and STANLEY CASSAN, M.D., Appellees.	No. 82-5110 D.C. No. CV 81-5461R ORDER

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

[signed] Robert Boochever
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 10 1983
PHILLIP B. WINBERRY
Clerk, U. S. COURT
OF APPEALS

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased, Appellant, v. DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON, FOXX, DUBROW & CANTER, a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, judge, JOHN COLE, judge, ELI CHERNOW, judge, PETER S. SMITH, judge, Appellees.	)	Nos. 82-5182 82-5195 ORDER

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[signed] Robert Boochever
United States Circuit Judge

COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZELVERN W. MANN, Administrator of the Estate of Ada Crews Mann, deceased VS Plaintiff(s) RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADM., ETC., ET AL. Defendant(s)	CASE NUMBER CV 81-5461 MLR NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS(CIVIL)	FILED FEB 22 1 Clerk, U District Court, Central District of Califor

TO: Kenneth Crews Mann, Esq.
P. O. Box 116
Van Nuys, CA 91408

Bruce Ogden Mann, Esq.
25231 Paseo de Alicia
Laguna Hills, CA 92653

Patty Mortl, Esq.
HARRINGTON, FOXX, DUBROW & CANTER
One Wilshire Building
Los Angeles, CA 90017

PLEASE TAKE NOTICE that the judgement of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on March 28, 1983 at 10:00 A.M. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 14, United States Courthouse, 312 N. Spring Street, Los Angeles, California. It will not [sic] be necessary for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: FEBRUARY 22, 1983 By: (signed) Magette Laskir

43

NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS
Civ 42 (11/76)

COPY

JUDGMENT

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LODGED
FEB 14 1983

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, deceased,
Plaintiff/Appellant,

No. 82-5110

DC CV81-5461MLR

vs.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D. BERNARD STROHM, ADMINISTRATOR, etc., et al.,

Defendants/Appellees.

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST
PHILLIP B. WINBERRY
CLERK, US COURT OF APPEALS
Clerk of Court
by: [signed]BettyMiller
Deputy Clerk

Filed and entered
November 09, 1982

COPY

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZELVERN W. MANN,

Plaintiff-Appellant,

vs.

DAVID H. CANTER, et al,

Defendants-Appellees.

No. 82-5182
82-5195

D.C. #CV 81-4689 MLRL

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is no here ordered and adjudge by this Court that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED

A TRUE COPY
ATTEST
PHILLIP B. WINBERRY
Clerk, U.S. COURT OF APPEALS
Clerk of Court
[signed]
by: Betty Miller
Deputy Clerk

Filed and entered NOVEMBER 10, 1982

COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZELVERN W. MANN

Plaintiff(s)

vs

DAVID H. CANTER, ET AL.,

Defendant(s)

CASE NUMBER
CV 81-4689 MLRL

FILED
FEB 22 1983

NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT OF COURT OF APPEALS (CIVIL)

TO: Kenneth Crews Mann, Esq.
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Bruce Ogden Mann, Esq.
25231 Paseo de Alicia
Laguna Hills, CA 92653

PLEASE TAKE NOTICE that the judgment of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on March 28, 1983 at 10:00 A.M. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 14, United States Courthouse, 312 N. Spring Street, Los Angeles, California.
not [sic]
It will/ be necessary for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: February 22, 1983 By: [signed]
Martette Laskir
Deputy Clerk

46

NOTICE OF HEARING ON FILING AND SPREADING
Civ 42 (11/76) JUDGMENT OF COURT OF APPEALS

APPENDIX C 46

No. 82-1839

IN THE

Supreme Court of the United States

October Term, 1983

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, Deceased,

Petitioner,

vs.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, Administrator, UCLA HOSPITAL & CLINICS, ANDREA CRACCHIOLO, III, M.D., STANLEY CASSAN, M.D.,

Respondents,

DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON, FOXX, DUBROW & CANTER, a legal partnership; JOSEPH A. WAPNER, DAVID N. EAGLESON, Judge, JOHN COLE, Judge, PETER S. SMITH, Judge,

Respondents.

CONSOLIDATED FOR HEARING.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DALE B. GOLDFARB,
MARK W. FLORY,
HARRINGTON, FOXX, DUBROW
& CANTER,
One Wilshire Bldg.,
Suite 703,
Los Angeles, Calif. 90017,
Attorneys for Respondents,
Richard Gold, M.D., et al.,
(The non-judicial Respondents).

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

Mann v. Gold

1. Whether petitioner's effort to relitigate a state court medical malpractice action in the guise of a federal civil rights claim, dismissed by the district court as affirmed by a unanimous Ninth Circuit decision following this Court's holding in *Polk County v. Dodson*, 454 U.S. 312 (1981), merits extraordinary discretionary review by this Court?

2. Whether physicians and a hospital administrator acted under color of state law when rendering medical services to a private patient in a non-custodial hospital merely because they were employed by a state-operated facility?

3. Whether a district court which awards attorney's fees to defendants pursuant to 42 USC § 1988 is required by *Hughes v. Rowe*, 449 U.S. 5 (1980) and *Cohn v. Papke*, 655 F.2d 191 (9th Cir., 1981) to issue express findings of fact and conclusions of law when dismissing a transparently obvious attempt to relitigate a state court medical malpractice action in the guise of a federal civil rights claim?

Mann v. Canter

4. Whether the substantial and uncontroverted evidence submitted in support of respondents' motion for summary judgment, which conclusively negated all of petitioner's allegations of improper conduct, justified the district court's grant of summary judgment?

5. Whether the district court's refusal to continue the hearing of a summary judgment motion for the purpose of permitting petitioner to conduct depositions, when there was no showing of how the depositions sought could have yielded any admissible evidence which would have contradicted the specific denials of respondents, amounted to an abuse of the court's discretion under Rule 56(f) of the Federal Rules of Civil Procedure?

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No. 82-1839

IN THE

Supreme Court of the United States

October Term, 1983

ZELVERN W. MANN, Administrator of the Estate of ADA CREWS MANN, Deceased,

Petitioner,

v.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, Administrator UCLA HOSPITAL & CLINICS, ANDREA CRACCHIOLO, III, M.D., STANLEY CASSAN, M.D.,

Respondents,

DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, LISA CARL, sole corporation, HARRINGTON, FOXX, DUBROW & CANTER, a legal partnership; JOSEPH A. WAPNER, DAVID N. EAGLESON, Judge, JOHN COLE, Judge, PETER S. SMITH, Judge.

Respondents.

CONSOLIDATED FOR HEARING.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

The present petition represents only the most recent act in a truly bizarre legal melodrama which began as a medical malpractice action instituted by petitioner and his attorney sons in the Los Angeles Superior Court in March of 1979, following the death of Ada Mann.

In *Mann v. Cracchiolo*, Los Angeles Superior Court Case No. NWC 76789, petitioner and his three sons, two of whom acted as attorneys of record for all plaintiffs, charged the Regents of the University of California, the UCLA Medical Center, fifty-four staff physicians, a radiology technician, the associate director/administrator of the hospital, and the hospital's data processing manager and finance director with (1) breaking the decedent's neck; (2) conspiring to conceal the existence of that broken neck; (3) keeping decedent alive in order to receive Medicare and Medi-Cal funds by intentionally performing useless operations upon her; and (4) then attempting to kill her in order to (a) conceal their complicity in causing and concealing the existence of the broken neck; and (b) assure that her death certificate would be signed without reference to a broken neck.[1]

During the course of the pretrial proceeding, plaintiffs attempted to disqualify a total of six superior court judges on the grounds that the judges were personally prejudiced against them, and filed eight petitions for extraordinary relief with the California Court of Appeal. When all else failed, plaintiffs filed the first of the consolidated actions

---

[1]In order to provide this Court some feeling for the nature and extent of the litigation between these parties, respondents have annexed hereto as an Appendix the unpublished opinion of the California Court of Appeal in *Mann v. Cracchiolo*, 2nd Civ. No. 66613, filed August 30, 1983, wherein the Court affirmed the superior court's grant of summary judgment to all defendants. The allegations of plaintiffs' first amended complaint are summarized at pages 4-6.

It should be noted that plaintiffs' petition for rehearing in 2nd Civ. No. 66613 is pending.

which are the subject of this petition, *Mann v. Canter*, wherein they contended that the law firm representing the defendants in the state court action, three individual defense counsel, four superior court judges and the retired superior court judge sitting as special master on discovery matters conspired together to deprive plaintiffs of their rights under the United States Constitution. After serving the district court lawsuit, plaintiffs contended that all named defendants were disqualified from any other participation in the state case.

The outlandish proceedings in the state trial court[2] were brought to a merciful conclusion on October 15, 1981, when the superior court granted defendants' motions for summary judgment. In granting the motions, the court relied on the declarations of expert witnesses establishing that the decedent did not break her neck on the date alleged by plaintiffs and that, moreover, the treatment rendered by defendant doctors conformed to the applicable standards of practice in the community. In addition, the court relied upon declarations by the individual defendants to the effect that their conduct conformed to the applicable standard of practice in the community and that they did not conspire to conceal the existence of a fracture of the decedent's neck, or to kill her, and upon deposition testimony by one of plaintiffs' own

---

[2]It is only with the exercise of considerable restraint that respondents resist the temptation to place before this Court substantial portions of the state court record, which is replete with episodes typified by one plaintiff attorney's reference to various defense attorneys, on the record in deposition, as "some kind of imbecile", "sarcastic bitch", and "jazz boy", respectively; by the other attorney for plaintiff referring to a defense attorney, on the record, as a "son of a bitch"; by plaintiffs' counsel telling the retired superior court judge acting as court-appointed special master at deposition to "shut up"; and culminating with the presiding judge of the Los Angeles Superior Court, at the request of the special master, ordering that all depositions be held in court with bailiffs present.

expert witnesses that, in his opinion, the decedent did not fracture her neck on the date asserted by plaintiffs. (Appendix, pp. 8-12.)

Literally days after summary judgment was granted in superior court, plaintiffs filed the second district court action, *Mann v. Gold*, a virtual twin to their state medical malpractice action thinly disguised as a civil rights case, wherein they named five of the defendants to the state court action. Naturally, plaintiffs simultaneously continued to pursue their appellate remedies in state court, as well as their companion "civil rights" case against the attorneys and judges.

Mann v. Gold

In the *Gold* action, plaintiff contended that defendant physicians and hospital administrator negligently treated decedent, causing her wrongful death, and further alleged that, in their capacity as state agents by virtue of their employment with UCLA Medical Center, defendants conspired to subject decedent to cruel and unusual punishment and to deprive her of her right to be heard. Defendants moved for dismissal pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. (Petition, Appendix A, p. 36.)

Finding no action "under color of state law", the district court granted the motions, and also granted defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988. (Petition, Appendix A, pp. 36-37.) The Court of Appeals for the Ninth Circuit affirmed.

Mann v. Canter

In the *Canter* action, plaintiff alleged that four state court judges, the retired judge acting as a discovery referee, three individual attorneys and the law firm representing the de-

fendants in the state medical malpractice action conspired to ruin the state court action. (Petition, Appendix A, p. 39.)

The judicial defendants obtained dismissals on the basis of judicial immunity.

The attorney defendants, respondents here, moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, relying on affidavits specifically denying all of the conduct alleged by plaintiff. The district court concluded that the insufficient, incompetent and inadmissible material submitted by plaintiff in opposition raised no triable issue of fact, and so granted summary judgment and a dismissal. (Petition, Appendix A, pp. 39-40A.)

The Ninth Circuit affirmed, and, concluding that the appeal was frivolous, awarded these respondents damages and double costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure. (Petition, Appendix A, p. 40B.)

REASONS FOR DENYING THE WRIT.

Petitioner's effort in these consolidated cases to both relitigate his state court medical malpractice action and to "punish" the judges and attorneys he perceives as responsible for his defeat was so obviously lacking in merit as to move the district court, in one instance, and the Ninth Circuit, in the other, to award these respondents the costs and fees they expended in defending themselves.

The present petition, replete with half-truths and distortions of law and fact, is equally unmeritorious, and demonstrates neither conflict between the courts nor important unsettled issue that warrants review by this Court.

Mann v. Gold

1. Plaintiff failed to establish activity under color of state law.

The United States Supreme Court has given a specific definition to the phrase "under color of" in *Monroe v. Pape*, 365 U.S. 167 (1961):

> "Misuse of power, possessed by virtue of state law and made possible *only* because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law."
> (Emphasis added.)

No reported decision has ever held that, in a noncustodial context such as that presented by this case, a violation of federal civil rights arose from wrongful conduct of treating physicians or administrators at a hospital that happened to be state operated. The reason is obvious: a treating physician's or administrator's employment by a state-operated noncustodial hospital is simply fortuitous. Neither employee is clothed with any special powers over the patient solely by virtue of such employment, and both could just as easily engage in identical wrongful conduct at a privately-owned facility.

Neither in the courts below nor in this petition has petitioner presented any authority supporting his contention that employment at a state-operated hospital cloaks physicians or administrators with the power of the state, thereby transforming their private conduct into activity "under color of" state law. In fact, petitioner has cited only cases which give compelling support to respondents' position that "color of state law" in the medical context arises only in a custodial setting. For example:

> *Estelle v. Gamble*, 429 U.S. 97 (1976), where a state prisoner sued prison officials, including the Medical Director of the Department of Corrections, and which stated that the government has an "obligation to provide medical care for those *whom it is punishing by incarceration.*" (429 U.S. at 103; Emphasis added);
>
> *Holmes v. Silver Cross Hospital of Joliet*, 340 F. Supp. 125 (N.D. Ill. 1972), where a court-appointed conservator of an incompetent patient forced the patient to undergo blood transfusions which were in violation of his religious beliefs;
>
> *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where a mental patient was involuntarily confined in a state mental hospital for fifteen years and, during that period, was deprived of medical treatment for his condition.

Other cases relied on by petitioner do not deal at all with the issue before this Court. In *Sprecht v. Patterson*, 386 U.S. 605 (1967), the trial judge sentenced a convicted sex offender to an indeterminate term of from one day to life on the basis of a psychiatric examination and report, without giving the petitioner a right to be heard or to confront witnesses; *In Re Kemmler*, 136 U.S. 437 (1890), also relied on by petitioner, is a death penalty case. Most puzzling to

respondents is petitioner's repeated citation of *Polk County v. Dodson*, 454 U.S. 312 (1981) in support of a number of sometimes conflicting propositions. Contrary to petitioner's confusing suggestions, *Polk County* supports respondents here, in that it stands for the proposition that an employment relationship between the state and an individual is not enough to establish that the individual acts under "color of law".[3]

Petitioner repeatedly suggests that decedent's confinement at UCLA Medical Center was in certain respects involuntary, and so "custodial". It should be noted that even a most generous reading of petitioner's complaint fails to reveal any allegations of imprisonment, no doubt due to the fact that decedent was in and out of the hospital at various times during the period at issue. (Appendix, p. 4.)

Even if petitioner could have somehow shown that decedent was falsely imprisoned, he would still be faced with the critical threshold problem of action "under color of" state law. As this Court stated in *Paul v. Davis*, 424 U.S. 693 (1976), conduct which is tortious under state law does not turn into a violation of federal civil rights law whenever the tortfeasor fortuitously happens to be a state employee. In this case, the defendant physicians and administrator were totally without state authority to hold decedent against her wishes. Consequently, even assuming *arguendo* that they

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[3]In addition to insisting that the opinion of the Court in *Polk County* lends support to virtually every contention he raises, petitioner suggests that the facts of *Mann v. Gold* present Justice Blackmun with an appropriate opportunity to expand upon the theory set forth in his dissenting opinion. Contrary to petitioner's suggestion, the public defender who is "acting to fulfill a state obligation" (454 U.S. at 328) and whose authority to represent his client "is possessed by virtue of the State's selection of the attorney and his official employment" (454 U.S. at 329) is easily distinguished from the physicians and administrator in *Mann v. Gold* whose authority to treat a particular patient in a non-custodial setting is derived exclusively from the patient's selection of the physician or institution.

drugged her to keep her quiet and operated on her to keep her bed-ridden until the statute of limitations ran on her fraudulently-concealed fatal injury, they did so as private physicians, not in the capacity of state agents, and could just as easily have abused decedent had they been treating her in a private hospital. In addition, at the time petitioner filed the complaint in *Mann v. Gold*, the Los Angeles Superior Court had already ruled that respondents had committed no tort under state law.

2. Contrary to petitioner's assertions, the law does not require a district court awarding attorney's fees pursuant to 42 U.S.C. § 1988 to issue formal findings of fact and conclusions of law, particularly when dealing with an obviously frivolous, unreasonable and groundless effort to relitigate an unmeritorious action.

In *Cohn v. Papke*, 655 F.2d 191 (9th Cir., 1981), the Ninth Circuit suggested, in a footnote, that a trial court deciding to grant attorney's fees in a civil rights action "should make findings of fact and conclusions of law detailing the basis for the decisions." (655 F.2d at 195, footnote 3.) Petitioner attempts, in vigorous argument, to raise this suggestion to the level of a "holding" imposing a "requirement of findings" on the courts. (Petition, p. 22.) Petitioner attempts to buttress this contention through reliance on this Court's statement in *Hughes v. Rowe*, 449 U.S. 5 (1980) that "the fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for that assessment of fees." (449 U.S. at 14.)

The present litigation presents a drastic contrast to the situations facing the courts in *Cohn* and *Hughes*. Here, as the district court knew when it issued its ruling, petitioner's purported civil rights action amounts to nothing more than an effort to relitigate an unsuccessful state medical malpractice action. As the Ninth Circuit held in affirming the

decision of the district court here, the court was well within its discretion in concluding, even in the absence of formal findings of fact or conclusions of law, that petitioner's action was "frivolous, unreasonable, or without foundation" within the meaning of *Hughes v. Rowe*. (Petition, Appendix A, p. 37.)

Mann v. Canter

3. Petitioner disingenuously argues that these respondent attorneys were dismissed from the *Canter* action because: (1) once the judicial defendants were dismissed on the basis of immunity, "the private attorneys are not considered to have acted under color of law" (Petition, p. 24); and (2) the cloak of "judicial immunity carries over to private attorneys corruptly conspiring with the judicial defendants." (Petition, p. 26.)

A cursory reading of the Ninth Circuit's decision in the *Canter* action demonstrates that, contrary to petitioner's assertions, these respondent attorneys were granted summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. These respondents conclusively negated all of petitioner's purported contentions through competent evidence, while petitioner attempted to rely on inadequate, incompetent and inadmissible matters. (Petition, Appendix A, p. 40A.)

Thus, the district court's holding that respondents "did not act under color of state law" is based, not on any jurisdictional or immunity notions, but on a broader, evidentiary finding that respondents simply did not commit the acts alleged by petitioner.

4. Finally, it is clear that the district court was well within its discretion in denying petitioner's request that the motions for summary judgment be postponed pending the conduct of certain depositions by petitioner.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit *facts essential to justify his opposition*, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." (Emphasis added.)

The Ninth Circuit could not envision how the conduct of the depositions requested by petitioner would have permitted petitioner to contradict the specific denials set forth in the affidavits submitted by respondents in support of their motions for summary judgment. (Petition, Appendix A, p. 40A.) Indeed, petitioner fails to suggest, even at this stage of the proceedings, how the discovery he requested could have negated these respondents affirmative factual showing.

The burden was on petitioner to specify some opposing evidence, which, through discovery, he could reasonably expect to adduce which would create a genuine issue of material fact. *Gifford v. Travelers Protective Association*, 153 F.2d 209, 211 (9th Cir., 1946.) He failed to carry that burden, and the district court quite properly refused to allow him to subject respondents to further expense, delay and harassment. The denial of petitioner's request was abundantly appropriate.

Conclusion.

These consolidated cases present this Court, not with a conflict between the lower courts or an unsettled issue that warrants extraordinary discretionary review, but a last-ditch effort by a disgruntled litigant and his attorney sons to locate still another forum for their personal vendetta against these

respondents. The decisions of the district court below, unanimously affirmed by the Ninth Circuit, are consistent in every respect with the rulings of this Court, with justice and with equity. They do not merit review by this Court.

Respectfully submitted,

DALE B. GOLDFARB,
MARK W. FLORY,
HARRINGTON, FOXX, DUBROW & CANTER,
Attorneys of Record for Respondents,
Richard Gold, M.D., et al.,
(The non-judicial Respondents).

APPENDIX.

NOT TO BE PUBLISHED

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, deceased; Kenneth Crews Mann; Gaylord Newman Mann; Bruce Ogden Mann; Zelvern W. Mann, individually as heirs,

Plaintiffs and Appellants,

v.

Andrea Cracchiolo III, M.D.; The Regents of the University of California; U.C.L.A. Hospital and Clinics; R. D. Arndt, M.D.; Douglas Bald, M.D.; Kenneth L. Baldwin, M.D.; Eugene Barnett, M.D.; Lawrence W. Bassett, M.D.; Marchall E. Bein, M.D.; Leslie Bennett, M.D.; J. L. Bernstein, M.D.; Livia G. Bohman, M.D.; Gerald Buckley, M.D.; John Carlson, M.D.; Stanley Cassan, M.D.; Sherrie Chatzkel, M.D.; Lynn W. Cooman, M.D.; Steven Croft, M.D.; D. Davidson, M.D.; Kevin Drake, M.D.; Leonard Feigenbaum, M.D.; Richard D. Ferkel, M.D.; Peter Folvary, M.D.; Sidney Friedman, M.D.; H. Gallen, M.D.; Humberto Galleno, M.D.; Steven Gausewitz, M.D.; Richard H. Gold, M.D.; Richard Gritz, M.D.; Neil Kahanowitz, M.D.; Rodney B. Kovick, M.D.; E.O. Leventen, M.D.; Norman D. Levine, M.D.; Joshua Levy, M.D.; Anthony A. Manaiso, M.D.; Marc Manger, M.D.; Rex McAlpin, M.D.; Roy Nachman, M.D.; Michael P. Norton, M.D.; Charles E. Osborn, M.D.; Graham Purcell, M.D.; Gregory Rahn, M.D.; Leo O. Rigler, M.D.; E. Rubenstein, M.D.; William Russell, M.D.; Robert L. Scanlon, M.D.; Rodney D. Schmidt, M.D.; R. Shorenstein, M.D.; Daniel H. Simmons, M.D.; Elias G. Theros, M.D.; Andre J. Van Herle, M.D.; Bruce Wannatabe, M.D.; Marvin Weiner, M.D.; J. Wright, M.D.; George K. York, M.D.; The State of California State Department of Benefit Payments aka State Department of Health Services, Beverly Myers, Director,

Defendants and Respondents.

No. 2 Civ. No. 66613. (Sup. Ct. No. NWC 76789).

Filed: August 30, 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter S. Smith, Judge, and Eli Chernow, Judge. Affirmed.

Bruce Ogden Mann and Kenneth Crews Mann for Plaintiffs and Appellants Kenneth Crews Mann, Bruce Ogden Mann, Gaylord Newman Mann, and Zelvern W. Mann, individually and as Administrator of the Estate of Ada Crews Mann, deceased.

Harrington, Foxx, Dubrow & Canter and Patty Mortl for Defendants and Respondents The Regents of the University of California and associated medical personnel.

Rushfeldt, Shelly & McCurdy and Horvitz and Greines, and Ellis J. Horvitz and S. Thomas Dodd for Defendants and Respondents Andrea Cracchiolo, III, M.D., Kenneth L. Baldwin, M.D., Graham Purcell, M.D., James Tibone, M.D., Lynn Cooman, M.D., Humberto Galleno, M.D., Edward O. Leventen, M.D., Mark Bernstein, M.D., and Richard D. Ferkel, M.D.

George Deukmejian and John K. Van de Kamp, attorneys general, Daniel J. Kremer, chief assistant attorney general-criminal division, S. Clark Moore, assistant attorney general, Anne Pressman, deputy attorney general, for Defendant and Respondent State Department of Benefit Payments aka State Department of Health Services, State of California.

NATURE OF THE CASE

On December 18, 1981, plaintiffs filed a notice of appeal from:

1. A summary judgment entered March 4, 1981, for defendant Roy Nachman, M.D.;

2. An order of July 15, 1981, granting motion of defendant Darrell Davidson, M.D., for summary judgment;

3. Summary judgment dated October 26, 1981, entered October 27, 1981, in favor of forty (40) named defendants;

4. Order after judgment made November 5, 1981, denying plaintiffs' motion for relief from default under Code of Civil Procedure section 473;

5. Order after judgment made December 18, 1981, granting costs to defendants; and

6. "If the appellate court deems the above orders to be a final termination of this lawsuit, plaintiffs hereby appeal all adverse rulings and orders made in this matter as upon entry of a final judgment of dismissal."

FACTUAL AND PROCEDURAL BACKGROUND

The underlying civil action was brought by Zelvern W. Mann as administrator of the estate of Ada Crews Mann, deceased; and by Kenneth Crews Mann, Gaylord Newman Mann, Bruce Ogden Mann, and Zelvern W. Mann, individually, as heirs of Ada Crews Mann, against the Regents of the University of California; UCLA Hospital and Clinics; 53-named individuals, most of whom were medical doctors, including Andrea Cracchiolo, III, M.D.; California State Department of Benefit Payments aka State Department of Health Services, Beverly Myers, Director, and Doe Doctors 1 through 100, Doe Nurses 101 through 200, Doe Hospital Administrative and Medical Personnel 201 through 300, inclusive, Life Insurance Company of North America, a corporation, and Does 301 through 400.

In their first amended complaint, filed September 17, 1979, plaintiffs allege eight causes of action. The fourth cause of action was for declaratory relief against the California State Department of Benefit Payments, and the sixth cause of action was against Life Insurance Company of

North America for breach of insurance contract. The fourth cause of action, against the State Department of Public Benefits Payments, etc., was severed from the main action on July 10, 1981, and is not a part of this appeal. The sixth cause of action, against Life Insurance Company of North America, is not a part of this appeal.

Some of the defendants demurred to the first amended complaint. The court sustained the demurrer as to the third, fifth, seventh, and eighth causes of action without leave to amend, leaving only the first and second causes of action against the defendants who are respondents in this appeal.

The first cause of action, for wrongful death, was brought on behalf of the heirs. It alleged that plaintiff Zelvern W. Mann was the surviving husband of Ada Crews Mann, deceased, and administrator of her estate; that plaintiffs Kenneth Crews Mann, Bruce Ogden Mann, and Gaylord Newman Mann were the sons of the decedent. Plaintiffs Kenneth Crews Mann and Bruce Ogden Mann, who are attorneys, are the attorneys for the plaintiffs.

The first cause of action, (wrongful death) alleged that the decedent was a patient at UCLA Medical Center; on November 1, 1977, decedent was taken into an X-ray room at the medical center for X rays of her feet in preparation for surgery upon her toes; at that time, decedent did not have a broken neck, but she could neither stand nor walk without physical assistance from an attendant; Dr. Andrew Cracchiolo III, a defendant, was decedent's treating physician and had her brought to the hospital for the X rays; "Defendants allowed and caused decedent to fall in the said X-ray room on November 1, 1977, and to strike the back of her head on the hard floor. This was a fall from a standing position, causing unconsciousness and breaking of her neck." Defendant Cracchiolo ordered X rays to be taken to determine whether injury had been suffered by decedent as

a result of the fall. Defendants sent the decedent home that day without telling decedent or plaintiffs that decedent had sustained a broken neck from said fall.

The complaint alleged that because of the X-ray pictures defendants knew that decedent's neck had broken as the result of the negligent handling of the decedent by the defendants which caused the decedent to fall backwards and break her neck, but that the defendants never notified the decedent nor the plaintiffs of that fact, but assured the decedent and the plaintiffs that decedent's neck had not been broken.

The first cause of action further alleged that the defendants refused to treat the decedent's broken neck; but from November 1, 1977, until the date of decedent's death, March 26, 1979, they performed numerous medical acts on decedent's body, which were irrelevant and worthless to the treatment of decedent's broken neck, which was the complete fracture of the odontoid process, that thereafter the defendants continued to take X rays from time to time of decedent's neck and head in January and September of 1978, and the decedent's broken neck was shown in the X rays. In reliance upon the statements of defendants, decedent and plaintiffs did not seek additional medical opinions concerning the possibility of serious injury to the decedent as a result of the fall but continued to rely on the defendants, who concealed from plaintiffs the fact of the fracture of the decedent's odontoid process. Plaintiffs did not learn that decedent's neck had been broken until August 1979 when the Los Angeles County Coroner certified the cause of decedent's death to be spinal cord damage due to fracture of the odontoid process of epistrotheus. The plaintiffs further alleged, on information and belief, that the defendants were attempting to kill the decedent while she was a patient at UCLA so that her death certificate could be signed without

reference to the fact of her broken neck and so as to conceal defendants' complicity in causing said broken neck and their criminal responsibility in concealing same from decedent, plaintiffs, and authorities, and to prevent an autopsy from being performed on the decedent, ". . . for an autopsy is a requirement where decedent's condition at death includes a broken neck." Plaintiffs did not discover the existence of the January 1978 and September 1978 neck and head X rays of decedent which showed the broken neck until shortly after her death on March 26, 1979, when a neurological surgeon confirmed to plaintiffs that the broken neck existed in decedent at the time of the January 11, 1978 X ray. Plaintiffs further alleged that the defendants had intentionally concealed said death-producing injury from the decedent and plaintiffs at all times.

The second cause of action, on behalf of the administrator of the decedent's estate, was captioned for "survival." It realleged by incorporation the larger portion of the first cause of action and alleged that defendant's conduct toward the deceased was willfull and intentional and "conceived in a spirit of criminal indifference" and that decedent incurred expenses before her death in unspecified sum for which damages were sought, and further asked for punitive damages in the amount of $75 million.

On October 5, 1981, following two years of intensive and heated motion practice, discovery, and deposition taking, defendants served and filed motions for summary judgment, which were heard and granted by the court on October 15, 1981. Additional facts and procedural information will be set forth as pertinent in the discussion of this case.

CONTENTIONS

Plaintiffs' principal contentions, in summary, are that the trial court erred in granting the defendants' motion for summary judgment in that the court erred in striking and not

legally considering plaintiffs' opposition papers; that triable issues of fact would have remained to be tried if those papers had not been stricken; and that the court erred in not granting plaintiffs' post judgment motions. There are other subsidiary contentions which will be taken up in the course of the discussion.

DISCUSSION

STANDARDS FOR REVIEW
OF SUMMARY JUDGMENTS

The summary judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with caution. (*Eagle Oil and Ref. Co. v. Prentice* (1942) 19 Cal.2d 553, 556.) Summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. (Code Civ. Proc., § 437c; *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374.)

"The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory." (*Lipson v. Superior Court, supra*, 31 Cal.3d at p. 374.) "The affidavits of the moving party are strictly construed, and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion." (*Slobjan v. Western Travelers Life Ins. Co.* (1969) 70 Cal.2d 432, at pp. 436-439. ". . . [I]ssue finding rather than issue determination is the pivot upon which the summary judgment law turns." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441.)

In passing on a motion for summary judgment, the trial court must apply the above law and principles in answering these questions: (1) is there a triable issue of material fact; and if not, (2) is the moving party entitled to a judgment as a matter of law?

THE TRIAL COURT PROPERLY GRANTED THE MOTIONS FOR SUMMARY JUDGMENT

The Defendants' Motion Papers

The motions for summary judgment of the defendant physicians, most of whom were radiologists, and of Holly Hoberg, a radiology technician, heard and ruled upon on October 15, 1981, were supported by the declarations of the moving parties, the declaration of D. M. Forrester, M.D., and portions of the deposition of George Campion, M.D.

In addition:

The motion of defendant Richard D. Ferkel, M.D., a general surgeon, was also supported by the declaration of Ronald W. Busuttil, M.D., board certified in general surgery; the motions of defendants Baldwin, Mark Bernstein, Cooman, Cracchiolo, Galleno, Levensen, Purcell and Tibone, all orthopedic surgeons, were also supported by the declaration of Leonard Marmor, M.D., a board certified orthopedic surgeon; and the motions of defendants Barnett, Carlson, Cassan, Croft, Levy, Kovick, MacAlpin, Simmons, and Van Herle, whose specialties were rheumatology, internal medicine, respiratory care, cardiology, pulmonary diseases, and endocrinology, were also supported by the declaration of Matthew O. Locks, M.D., who is board certified in internal medicine.

The declarations of the doctor defendants categorically denied the charging allegations of the complaint and declared, inter alia, their specific involvements in the case of Ada Crews Mann, that they were not in the room when she fell on November 1, 1977; that they had not at any time concealed, attempted, or conspired to conceal, any information from anyone regarding the health, care, and/or treatment of her; that services they provided for decedent were not provided for the purpose of artificially inflating her bill

or obtaining Medicare or MediCal funds; that they never attempted or conspired to kill Ada Crews Mann, and that, in their opinion, their conduct at all times conformed to the standard of practice in the community relating to the practice of their named specialty.

The declaration of Holly Hoberg, radiology technician, dated September 17, 1981, declares that her only involvement with the decedent occurred when she and decedent were in an X-ray room on November 1, 1977; that she had never concealed or attempted or conspired to conceal any information from anyone regarding the health, care, and/or treatment of decedent; and that the services she had provided to decedent were not for the purpose of inflating her bill or obtaining funds, and that she never attempted or conspired to kill decedent.

An earlier affidavit of Hoberg, dated November 21, 1980, had been filed in the court's records on December 3, 1980. It declared that her function at UCLA was to position patients so that X rays could be taken and then to take the X rays; that she had been positioning Ada Crews Mann's feet for X rays when she fell on November 1, 1977; that the allegations of the complaint that Hoberg was a party to a conspiracy to conceal medical facts and that she kept decedent in a drugged state and attempted to kill her were sham, spurious, and scandalous.

The declaration of D. M. Forrester, M.D., a board certified radiologist dated August 28, 1981, declared that she had reviewed copies of the X rays of decedent taken after her fall on November 1, 1977, and copies of many other listed X rays and of radiology reports, all of which had the name of Ada Crews Mann on them and were from UCLA and that in her opinion, all of "those reports were prepared in conformity with the standard of practice for radiologists in this community"; that she had,

". . . reviewed the x-rays dated November 1, 1977. To a reasonable degree of medical certainty the November 1, 1977 x-rays do not show any fracture or dislocation. To a reasonable degree of medical certainty I do not believe the patient sustained a fracture of the odontoid process on November 1, 1977 at any time that day prior to the taking of those x-rays. Some of the reasons for my opinion are: (1) The alignment of C-1 and C-2 is normal; (2) There is no evidence of prevertebral soft tissue swelling, which normally would be present if the patient sustained a fracture of the odontoid process; (3) If the patient had recently sustained a fracture of the odontoid process she would have been in too much pain to rotate her head to the positions required for that series of x-rays."

George Campion, M.D., is Director of Radiology at St. Joseph Medical Center, Burbank, California. Dr. Campion's deposition was taken by defendants on July 28 and August 10, 1981. In it he testified, in reference to the skull X-ray pictures of decedent Ada Crews Mann taken shortly after her fall on November 1, 1977, that ". . . you cannot anatomically rule it out [a fracture of the odontoid process] on radiographic method, although the fact that she can turn her neck for the positioning of the skull X rays, it is unlikely that she does have a fracture at this time," and that, if her odontoid had been fractured on that date, ". . . I don't think the patient would have been able to turn her neck in order to position her head for these lateral views." Campion also testified that he had not formulated an opinion as to whether any of doctors-defendants Arndt, Bassett, Bein, Bennett, Bernstein, Bohman, Drake, Feigenbaum, Friedman, Gold, Levine, Manger, Morton, Russell, Scanlon, Schmidt, and Weiner, had failed to comply with the standard of practice relating to radiology in relationship to decedent Ada Crews Mann but that he had never told anyone that any of those

doctors had failed to comply with the standard of practice.

The declaration of Dr. Busuttil, supporting the motion of defendant Ferkel, declared that he had reviewed the UCLA Hospital and Clinic's chart pertaining to Ada Crews Mann; and in his opinion, the care rendered to her by Richard Ferkel, M.D., conformed to the standard of practice relating to general surgeons in the community in the light of her history and symptoms.

The declaration of Leonard Marmor, M.D. supporting the motions of the orthopedic surgeons declared that he had reviewed the UCLA Hospital and Clinic's chart relating to Ada Crews Mann and copies of numerous listed X rays pertaining to her, including those of November 1, 1977; and in his opinion the care rendered to decedent by the eight orthopedic surgeons conformed to the standard of practice for orthopedic surgeons in the community in the light of her history and symptoms.

The declaration of Matthew O. Locks, M.D., supporting the motions of the remaining defendant doctors, declared that he had reviewed a copy of the UCLA Hospital and Clinic chart pertaining to Ada Crews Mann; and based upon his education, professional background, and review of the above-mentioned records, it was his opinion that the care rendered to Ada Crews Mann by each of those doctors, naming each of them, was appropriate and reasonable, in light of Ada Crews Mann's history and symptoms; that the records reflected that she had a multitude of serious medical problems, including severe rheumatoid arthritis, and that the care and treatment rendered to decedent by those doctors conformed to the standard of practice in the community of internists.

The declaration of defendant Bernard Strohm, dated September 14, 1981, established that he was the Associate

Director/Administrator at UCLA Hospital and Clinics; that he had no contact with Ada Crews Mann and was not aware that she was a patient at UCLA until after the instant lawsuit was filed; that he never concealed or attempted or conspired to conceal any information from anyone regarding the health, care, and/or treatment of Ada Crews Mann and had never attempted or conspired to kill her.

The declaration of defendant William S. Russell, dated September 12, 1981, established that he was the data processing manager at UCLA Hospital and Clinics during the relevant period of time; that he had no contact with Ada Crews Mann and was not aware that she was a patient at UCLA until after the lawsuit was filed; that he had never concealed or attempted or conspired to conceal any information concerning her health or care or medical treatment from anyone and had never attempted or conspired to kill her.

The Trial Court Did Not Err In Striking, And Not Legally Considering Plaintiffs' Papers Filed In Opposition To The Motions For Summary Judgment.

Defendants' papers in opposition to the motion were not timely filed.

On Monday, October 5, 1981, defendants served and filed eleven motions for summary judgment, or for order specifying issues as without substantial controversy, in the underlying case. The motions were noticed for hearing at 9 a.m. on Thursday, October 15, 1981.

Rule 16, subdivision B, of the Law and Motion Rules of the Los Angeles County Superior Court provides:

> "B. All papers, other than those initiating the proceedings, whether in opposition or support, shall be filed directly with the court clerk in the law and discovery department in which the matter is pending at

> least five calendar days but in no event later than 4:30 p.m. of the third court day preceding the scheduled hearing or they will not be considered, unless time is shortened by order of court."

Monday, October 12, 1981, was a holiday; therefore, the third court day preceding the scheduled hearing was Friday, October 9, 1981.

Plaintiffs served their opposition papers on defendants by mail on Monday, October 12, 1981. The record reflects that plaintiffs filed the court's copy with the clerk, and that the trial judge received it on Tuesday, October 13, 1981.

The opposition papers had not been received by any of defense counsel prior to the hearing on October 15th.

At the time of the hearing of the motions, the court granted the request of defendants' counsel for a recess in order to give them an opportunity to read the court's copy of plaintiffs' opposing papers. At the conclusion of the morning arguments, just before the noon recess, plaintiffs' counsel gave defendants' counsel a copy of the opposition papers in response to their request.

After hearing argument on the motions, the court announced that plaintiffs' ". . . opposing affidavits will not be legally considered, they will be stricken, . . ." pointing out that defendants' counsel had never received the papers. The court stated that it was relying on *Shadle v. City of Corona* (1979) 96 Cal.App.3d 173. *Shadle* holds that local court rules have the force of procedural statutes so long as they are not contrary to legislative enactments, as provided in Government Code section 68070. (*Id.* at 177.) In *Shadle*, as in the case at bench, the question of the validity of local rules became an issue in respect to the timeliness of the filing of counteraffidavits in opposition to a motion for summary judgment.

In *Shadle*, plaintiff's attorney requested leave to file counterdeclarations at the time of the hearing in spite of a local rule requiring such filing not later than three (3) court days prior to the date of hearing, as is the rule in the case at bench. The court denied the request, granted the motion, summary judgment was granted, and the judgment was affirmed on appeal. In discussing the point the reviewing court of appeal said:

> "If the Legislature intended to grant parties opposing a motion for summary judgment an absolute right to file counter-affidavits at any time up to and including the time of hearing, we are confident that this policy would have been expressed in positive language. In the absence of any positive statement the presumed intent of the Legislature is that all procedural details, including filing deadlines for papers in opposition, are subject to court rule. This is all the more reasonable because of the obvious disadvantages of any system permitting last minute filing. A hearing on a motion for summary judgment cannot be satisfactorily conducted if neither the court nor the moving party is familiar with the opposing papers. At the very least, the hearing will have to be interrupted while the papers are read. The requirement that opposing papers be filed a reasonable time in advance of the hearing helps to ensure that the court and the parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time." *Shadle v. City of Corona*, (1979) 96 Cal.App.3d 173, 178-179.

Defendants have also presented the argument that inasmuch as Dr. Fox had not been designated by plaintiffs in response to the requests of defendants for designation of expert witnesses under Code of Civil Procedure section

2037,[1] the court could not consider Dr. Fox's declaration in ruling on the summary judgment motions.

Defendants have cited no authority for that argument. As the trial court opined,

> "The question . . . is an interesting one, and I don't think [it] has ever been decided under California law. Whether or not this would preclude him from filing a declaration, I don't know."

Having decided that the court properly struck the opposing papers on the grounds of untimeliness, we do not reach that question here.

Plaintiffs' Opposition Papers, Including The Declaration Of Plaintiffs' Expert, Dr. Fox, Would Not Have Been Competent Evidence On The Standard Of Care Required Of Defendant Doctors If They Had Been Timely Filed And Legally Considered In Opposition To The Motions

The papers submitted by plaintiffs in opposition to the motions for summary judgment consisted of a memorandum of points and authorities, declarations of J. DeWitt Fox, M.D., declarations of plaintiffs Kenneth Crew Mann, Bruce Ogden Mann, and Zelvern Mann and certain exhibits. Nearly all of plaintiffs' argument, in their opposition papers, was based upon the declarations of Dr. Fox.

If the opposition papers had been timely filed and legally considered, the declarations of plaintiffs Mann, all lay persons, would not have been competent to establish the standard of care required of defendant doctors in the case at bench. Plaintiffs' opposition depended entirely upon the declarations of Dr. Fox.

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[1]All references hereinafter are to the Code of Civil Procedure, unless otherwise specified.

Plaintiffs had sought to present Dr. Fox's declarations in order to establish that the acts of the defendant physicians did not meet the standard of care required of them and that their failure to meet that standard caused the decedent's death.

Despite the fact that the court announced that plaintiffs' opposing affidavits would ". . . not be legally considered, they will be stricken . . . ." the reporter's transcript reflects that the declarations of Dr. Fox had been read by the trial judge, they were read by defense counsel during a recess called for that purpose, a copy of the papers was given to and possessed by defense counsel during the noon recess, and they were alluded to frequently during arguments on and consideration of the motions. In granting the motions the trial judge stated that Dr. Fox's declarations did not set forth the requisite foundational facts to qualify him to testify about the standard of care against which the performance of the defendant doctors must be measured. The court said that there must be something in the declaration of a witness that indicates that he has some knowledge of the subject about which he is testifying. The court referred to *Brown v. Colm* (1974) 11 Cal.3d 39, 645 where our Supreme Court said:

> "The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance."

We observe that Evidence Code section 720, subdivision (a) provides, in part:

> "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to which his testimony relates."

Our Supreme Court has stated the rule as to the standard of care for physicians as follows:

> "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman. And competency of an expert 'is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement.'
>
> "The criterion in this regard is not the highest skill medical science knows; 'the law exacts of physicians and surgeons in the practice of their profession only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances.' The proof of that standard is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as 'occupational experience — the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood.' He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured." *Sinz v. Owens* (1949) 33 Cal.2d 749; see also *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.

In ruling the trial judge stated that

". . . insofar as Dr. Fox's declaration is concerned, I think that it just does not have the requisite foundational facts in there to qualify him to testify about the standard of care.

"One does not necessarily have to be a radiologist, but if he isn't a radiologist, there has to be, although it be brief, something in there that indicates that he has some knowledge about which he is testifying. And the position of the Court today in ruling on the motion for summary judgment is not unlike that of a judge who is hearing an objection to the qualifications of an expert in trial and has to decide whether or not that person is qualified or not."

In *Pearce v. Linde*, (1952) 113 Cal.2d 627, 629, the court held that a specialist in internal medicine, with no experience in orthopedics, was not qualified to give expert testimony in a matter involving the standard of care required in the practice of orthopedics. To the same effect see *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 477, in which it was held that a doctor with 29 years of experience as the chief autopsy surgeon in the coroner's office was not qualified to testify as an expert on the treatment of head injuries.

Plaintiffs' proposed expert, Dr. Fox, was a neurosurgeon, a neurologic surgeon. The defendant doctors in this case were radiologists (18), and other specialists in rheumatology, internal medicine, respiratory care, cardiology, pulmonary diseases, endocrinology, general surgery, and orthopedic surgery. None of them was a neurologic surgeon.

On the subject of determining the competency and qualifications of an expert witness, our Supreme Court has said:

"It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown." *Huffman*

v. Lindquist (1951) 37 Cal.2d 465, 476.

We find no abuse of discretion by the trial court here in determining that plaintiffs' proposed expert, Dr. Fox, was not qualified to testify as expert on the standard of care required of defendant doctors in the case at bench, even if his declaration and the opposition papers had been timely filed and legally considered.

There Were No Triable Issues of Fact

In the absence of admissible evidence on personal knowledge by persons competent to testify to the matters stated, no triable issues of fact were raised or remain.

In their brief, plaintiffs argue at length that there were triable issues of fact remaining in this case and that, therefore, the court erred in granting defendants' motions.

We have examined plaintiffs' arguments carefully, and have searched their references to the record on appeal, and find this contention to be without merit. Substantially all of their argument is based upon the incorrect assumption that plaintiffs' papers in opposition to the motions were timely filed, were before the trial court, and were legally considered. Further, plaintiffs incorrectly assume that those papers would have been competent evidence on the standard of care required of defendants herein. Those assumptions are incorrect and have been discussed, above, in this opinion.

Lastly, plaintiffs contend that there is a triable issue of fact as to whether Ada Crews Mann fell on November 1, 1977. The issue was not whether she fell, but whether she suffered a fracture of the odontoid process on that date. That subject was fully addressed in the depositions of the individual defendants and of defendants' expert, D. M. Forrester, M. D., and in the excerpts from the deposition of George Campion, M. D., which are discussed under the heading, "The Defendants' Motion Papers," above.

Plaintiffs also contend that the motion of defendant Robert L. Scanlon, M. D., raised a triable issue of fact and should not have been granted. The contention is without merit. Dr. Scanlon's only involvement with the care of decedent was to interpret some chest X rays in October 1978, nearly one year after decedent's fall of November 1, 1977, and about five months before her death on March 26, 1979. The evidence in the declarations of Scanlan and Dr. Forrester and the depsition of Dr. Campion, that Scanlon's conduct conformed to the applicable standard of practice, are not controverted by any evidence by an expert witness.

The same is true of plaintiffs' contention that the failure of defendant doctors to have decedent examined by a neurosurgeon was conduct below the standard of practice required of defendant doctors, and that this raised a triable issue of fact. Plaintiffs base this contention on the declarations of Dr. Fox, which were not properly before the trial court and would not have been competent evidence on that standard of care if they had been before the court and legally considered.

THE COURT PROPERLY GRANTED THE MOTION OF DEFENDANT FEIGENBAUM FOR SUMMARY JUDGMENT

Plaintiffs contend that the court erred in granting the motion for summary judgment of defendant Feigenbaum on October 15, 1981, because the court had previously denied such a motion on the ground that triable issues of fact existed, and had denied a motion for reconsideration of the denial of that motion.

Feigenbaum's earlier motion had been based upon the ground that he had been named as a defendant in the action because of a mistake of fact, and that he never should have been so named. The motion was not supported by decla-

rations or depositions as to the merits of the case.

A motion for a summary judgment is a proper procedure where the question of identity of one of the parties is raised. *Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240.

Defendant Feigenbaum's motion of October 15, 1981, was supported by exerpts from the deposition of Dr. Campion and declarations of himself and Dr. D. M. Forrester. Feigenbaum's motion pointed out, in compliance with section 1008, that his earlier motion had been denied, as had his motion for reconsideration of that ruling. It also pointed out that at the time of the earlier rulings (December 3, 1980, and Apri 2, 1981) defendants did not know the identities of plaintiff's intended expert witnesses. Plaintiffs designated those witnesses on July 13, 1981, and among them was Dr. George M. Campion. Dr. Campion's deposition is discussed under the heading, "The Defendants' Motion Papers," above. It was included as one of the papers supporting defendant Feigenbaum's motion. In his deposition Campion also testified, inter alia, that he had not formulated an opinion as to whether Feigenbaum had failed to comply with the standard of practice in relationship to decedent Ada Crews Mann, but that he had never told anyone that Dr. Feigenbaum had failed to comply with the standard of practice.

Defendant's moving papers also included the declaration of D. M. Forrester, M. D., a board certified radiologist, dated August 29, 1981. The content of Dr. Forrester's declaration is discussed under the heading, "The Defendants' Motion Papers," above.

Dr. Feigenbaum's own declaration states that his only involvement in the case of decedent Ada Crews Mann ". . . was the interpretation of chest X-rays taken of Mrs. Mann

on September 25, 1978"; that he was not in the room when decedent fell on November 1, 1977; that

> "I never at any time concealed, attempted to conceal or conspired to conceal any information from anyone, regarding the health, care, and/or treatment of Ada Crews Mann.
>
> "In my opinion, my conduct in reading the chest X-rays of Ada Crews Mann conformed at all times to the applicable standard of practice in the community for radiologists.
>
> "The services I provided in connection with Ada Crews Mann were not for the purpose of artificially inflating her bill or obtaining Medicare or MediCal funds. I never attempted to kill or conspired to kill Ada Crews Mann."

Plaintiffs have cited no authority for their contention that a denial of motion for summary judgment bars a later motion for a summary judgment in the same civil action, and we have found none. In *Citizens for Parental Rights v. San Mateo County Board of Education* (1975) 51 Cal.App.3d 1, 6, fn.4, cited by defendants, a motion to dismiss an amended complaint on the grounds of failure to state a cause of action as a matter of law was granted after a motion for summary judgment had previously been denied, and the judgment was affirmed. That case does not govern the question here presented, but it tends to be pursuasive.

We believe that the policy inherent and expressed in section 437(c) provides the best answer to the question. That section mandates that after ruling on a motion for summary judgment, "the action shall proceed as to the issues remaining." *Conway v. Bughouse, Inc.*, (1980) 105 Cal.3d 194, 202-203, cited by plaintiffs, which, again, does not govern the question presented, is not to the contrary.

When the trial court denied Feigenbaum's earlier motion for summary judgment, his status as a defendant in the

underlying civil action was not changed; it was certainly one of "the issues remaining." When, after substantial discovery, his status and role in the case was more clearly defined, there was no reason in law or common sense why he could not again move for a summary judgment, provided he complied with the requirements of section 1008, as he did. The denial of the earlier motion for summary judgment decided none of the issues of the case, and did not bar the later motion for summary judgment which the court granted.

THE APPEAL AS TO DEFENDANT ROY NACHMAN MUST BE DISMISSED AS NOT TIMELY FILED

The court granted defendant Roy Nachman's motion for summary judgment on February 11, 1981. The implementing order of the court was made on March 2, and was entered on March 4, 1981, and notice of entry of judgment was served on plaintiffs by mail on March 5, 1981. Plaintiffs' motion for new trial of that summary judgment motion and order was denied on May 1, 1981. Notice of appeal was filed December 18, 1981, more than seven months later.

California Rules of Court, rule 2, subdivision (a), requires that notice of appeal shall be filed within sixty days after the date of mailing of notice of entry of judgment; rule 3, subdivision (a), extends that time until thirty days after entry of the order denying a valid motion for new trial.

Plaintiff's appeal from the judgment entered March 4, 1981, was not timely filed and must be dismissed.

THE ORDER GRANTING THE MOTION OF DEFENDANT DARRELL DAVIDSON FOR SUMMARY JUDGMENT WAS PROPERLY MADE, BUT IS NOT AN APPEALABLE ORDER

On July 15, 1981, the court made a minute order granting the motion for summary judgment filed by defendant Darrell Davidson. No judgment has ever been made and entered

pursuant to that order, which is not an appealable order. (Section 904.1; and see 6 Witkin, Calif. Procedure, 2d ed., 4074, Appeal, § 59).

We have reviewed the record pertaining to the motion made by defendant Davidson, the opposition thereto by plaintiffs, and the argument before the court, and it is apparent that the court properly granted the motion. Inasmuch as a judgment has not been made and entered on the order, the appeal is premature and is dismissed.

THE COURT DID NOT ERR IN DENYING PLAINTIFFS' POST JUDGMENT MOTIONS

The Motion Under Sections 473 and 663

Plaintiffs contend that the court erred in denying their post judgment motions for relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect, under section 473, and to set aside the judgment as being erroneous as a matter of law and inconsistent with the court's order of October 15 and 16, 1981, under section 663.

At the time this motion was made, section 663 applied to motions based upon erroneous or inconsistent findings of fact and conclusions of law, and to judgments or decrees based upon them. The present appeal is based upon a summary judgment, which does not involve findings of fact or conclusions of law. The point is without merit.

In their motion under section 473, they argue that the court erred in striking their papers in opposition to the motion as being filed untimely. That is a claim of judicial error, not of mistake, inadvertence, surprise, or excusable neglect. Judicial error is not cognizable error under section 473. Judicial error is subject to review on appeal, and section 473 was never intended as a substitute for an appeal. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892,

897, fn. 5.)

In *Carroll* the court also said

> "It is well established that ' "a motion for relief under [Code of Civil Procedure] section 437 is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof the exercise of that discretion will not be disturbed on appeal." '
>
> "In general, a party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, in advertence, or general neglect was excusable 'because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief.' (Citation.] The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice." [Citations.] (*Id.* at pp. 897-898.)

In the case at bench, two of the plaintiffs were the attorneys for all four of the plaintiffs, and the imputation of negligence has merged and is clear.

Furthermore, we note that plaintiff made no objection to going forward with the motions at the time they were heard; that they knew of Rule 16B, which required filing all papers no later than the third court day before the hearing; that they did not ask for an order shortening time to file their opposition papers as provided under Rule 16B, nor did they request a continuance on the ground that they did not have sufficient notice.

In addition to the foregoing, we have discussed the untimeliness of the filing of the opposition papers, above.

We find plaintiffs' contention to be without merit.

The Motion For A New Trial

Plaintiffs' motion for a new trial was substantially a reargument of many of the grounds which they had argued before in other aspects of the case; it was old and decided

material in another context.

Plaintiffs' claim to newly discovered evidence material to their case which they could not, with reasonable diligence, have discovered and produced at the trial was an additional declaration of J. DeWitt Fox, M. D., setting forth his credentials and in effect restating the statements in his earlier declaration. In addition, he appended his curriculum vitae. All of this material was, or should have been, known to the plaintiffs before the time of the hearing of the motions for summary judgment. This contention is without merit.

IT WAS NOT ERROR FOR THE COURT TO APPOINT A SPECIAL MASTER TO PRESIDE OVER THE DEPOSITIONS

The record in this case discloses that the parties experienced exceptionally disruptive tactics during deposition taking. On December 7, 1979, the parties, with the approval in writing of plaintiffs' counsel Kenneth Crews Mann as to form and content, submitted to the court a proposed order appointing a special master in the proceedings. Pursuant thereto, the court, on December 7, 1979, appointed retired judge Joseph Wapner as special master for all depositions in the case at the expense of the defendants.

On March 17, 1980, the court made an order, nunc pro tunc, modifying and clarifying its previous order to provide that the prevailing parties would be entitled to claim as costs any sums they might expend for fees for the services of the special master.

On April 17, 1980, the court enlarged the previous order to provide that Judge Wapner would preside as special master over all discovery proceedings. The remainder of the previous order was confirmed.

On February 10, 1981, the order of April 17, 1980, was vacated, without prejudice to making an order consistent

with *Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 600.

Difficulties between the parties continued, and the court made a new protective order on February 24, 1981, that retired Judge Joseph Wapner as special master should control all deposition proceedings, with the court retaining final power to review and rule upon his recommended rulings. That order was reconfirmed by order made May 1, 1981.

The relationship between the parties continued to deteriorate and became hostile to the point that on August 28, 1981, special master Wapner appeared before the Presiding Judge, in Department 1 (all parties represented) and requested, and the court made, an order that all further depositions in the case be conducted in the courthouse in the presence of bailiffs.

We judicially notice from our records that the plaintiffs filed petitions in this court of appeal for writs which would prohibit retired Judge Wapner from acting in any capacity in the case and/or to prohibit the superior court from appointing him for any purpose, as follows: No. 2 Civ. 61628, February 23, 1981; No. 63344, August 24, 1981; and No. 63649, October 1, 1981. Each of those petitions was considered and denied by this court. Our Supreme Court denied petitions for hearing in Nos. 63344 and 63649.

The court did not err in appointing a special master, nor in denying plaintiffs' motion to tax costs, nor in awarding the special master's fees as costs to defendants. Section 2019, subdivision (d), authorizes the court to limit the scope and manner of taking depositions, as provided in subdivision (b) of that section, whenever there is a showing that the examination is being conducted in such manner as unreasonably to annoy or oppress the deponent or a party. Subdivision (b)(1) authorizes the court to make any order

". . . which justice requires to protect the party from annoyance, . . . or oppression . . ." and further authorizes the court ". . . to impose upon either party . . . the requirement to pay such costs and expenses . . . as the court may deem reasonable."

It is eminently clear that the court's orders in these matters were correct and proper.

We have noted and considered each and all of the other contentions raised by plaintiffs in their brief and have found that they would not change or have any effect upon the decision in this case and that they do not require further discussion in this opinion.

DECISION

The appeal from the judgment entered in favor of Roy Nachman is dismissed because it was not timely filed.

The appeal from the order granting summary judgment for Darrell Davidson is dismissed because that order is not an appealable order.

In all other respects the appeals from the judgment and appealable orders after judgment are affirmed. Respondents are allowed their costs on appeal.

NOT TO BE PUBLISHED.

DANIELSON, J.

We concur:

LUI, Acting P. J.

ROSS, J., pro tem.*

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*Assigned by the Chairperson of the Judicial Council.

No. 82-1839

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ZELVERN W. MANN, ADMINISTRATOR OF THE ESTATE OF ADA CREWS MANN, DECEASED,

Petitioner,

vs.

RICHARD GOLD, M.D., JOSHUA LEVY, M.D., JOHN CARLSON, M.D., BERNARD STROHM, ADMINISTRATOR UCLA HOSPITAL & CLINICS, ANDREA CRACCHIOLO III M.D., STANLEY CASSAN, M.D.,

Respondents;

DAVID H. CANTER, LISA CARL, DALE GOLDFARB, individually, DAVID H. CANTER, sole corporation, Lisa Carl sole corporation, HARRINGTON, FOXX, DUBROW & CANTER a legal partnership; JOSEPH A. WAPNER; DAVID N. EAGLESON, JUDGE, JOHN COLE, JUDGE, PETER S. SMITH, JUDGE,

Respondents.

CONSOLIDATED FOR HEARING

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Kenneth Crews Mann,
Attorney at Law,
Member of the Bar
of this Court;

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1839

ZELVERN W. MANN, ADMINISTRATOR OF THE ESTATE OF ADA CREWS MANN,

Petitioner,

vs.

RICHARD GOLD, M.D., et al., *Respondents &*

DAVID H. CANTER, etc., et al., *Respondents.*

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents' Brief in Opposition to the within Petition for Writ of Certiorari fails to discuss Petitioner's California Code of Civil Procedure Section 36 right to trial, Petition p. 8, thereby admits this issue, as does Respondents' APPENDIX, by omission. Further, Joseph Wapner, by failing to reply, admits Petitioner's allegations; he is not a judge under *Bird vs. Superior Court*, 112 Cal. App.3d 595, 598. All judicial defendants fail to respond. Further, Respondents' brief

contains material misstatements of law and fact.

I. RESPONDENTS' LEGAL ARGUMENT

Respondents misstate the issues and the law, beginning with the first of their questions presented. Petitioner's state court action NWC76789 for wrongful death and intentional concealment of a death-producing injury, more than medical malpractice negligence, is not relitigated in *Mann vs. Gold*, a civil rights action.[1] The federal court misapplied *Polk County vs. Dodson*, 454 U.S. 312 (1981, Petition pp. 9, 23, 24, in *Mann vs. Canter*, claiming that Petitioner was suing the private attorney defendants for legal malpractice, Petition p. 35; Respondents evade this issue, as did the Ninth Circuit, Petition p. 13.

Respondents' second question presented argues evidence, although dismissal of *Mann*

[1]THE "NOT TO BE PUBLISHED" opinion of the state Second District Court of Appeals evades discussion of the *stay* in effect when respondents filed their summary judgment motions. Respondents fail to admit the state court decision was a *default*, not on the merits. Petitioner is in the process of petitioning the State Supreme Court for hearing, and possibly this court on due process issues.

vs. Gold was on jurisdictional grounds. Further, Petitioner alleges, Petition p. 15, more than "mere" state employment; Medicare was charged over $235,000 "for ... medical procedures not related to correction of her broken neck...." and that decedent was drugged in the hospital September, October and November, 1978 to conceal her death-producing condition, citing *Estelle vs. Gamble*, 429 U.S. 97 (1976). The deceit of Drs. Gold, Cracchiolo, et al., imprisoned decedent, without her consent, while her body was used in experimental operations in a state university hospital, Petition p. 14. Triable issues mandate trial on the merits, so this Court should find "color of state law" in the allegations of Petitioner.[2]

Respondents' third point again falsely claims relitigation of a state court "medical

[2]State Court defendant REGENTS OF THE UNIVERSITY OF CALIFORNIA by its insurance defense attorneys has prevented Petitioner from having a trial on the merits in NWC76789 and these federal actions. Under color of state law, Petitioner is deprived of his due process right to a trial on the merits.

malpractice action" in opposing Petitioner's attorney fees argument, p. 9 Opposition. But as we have shown, Petition p. 35, the district court did not know when it issued its ruling whether it was ruling on legal or medical malpractice, citing *Polk County vs. Dodson* erroneously in *Mann vs. Canter*, confusing it with *Mann vs. Gold*. Findings of fact and conclusions of law might have shown *why* the district court awarded attorney fees in one case; *Cohn vs. Papke*, 655 F.2d 191 and *Hughes vs. Rowe*, 599 U.S. at 14, Petition p. 21.

Respondents cite *Paul vs. Davis*, 424 U.S. 693 (1976)[96 S.Ct. 1155] for the holding that "conduct which is tortious under state law does not turn into a violation of federal civil rights law...", Brief in Opposition p. 8. But even in *Paul vs. Davis*, a case of defamation by police officers, the dissent by Justices Brennan, Marshall and White calls that *ex parte* trial and conviction of respondent Davis a violation of his rights under 42 U.S. §1983

and the Fourteenth Amendment. Now, Petitioner did not sue for defamation but for grievous deprivations by the state of his own and his decedent wife's rights under the U.S. Constitution to life and due process, in *Mann vs. Gold* and *Mann vs. Canter*, respectively.

The right to due process argued by the Petitioner under *Dennis vs. Sparks*, 449 U.S. 24 (1980), Petition pp. 23-29, is evaded and ignored by Respondents, who merely reiterate their trial court denials of wrongdoing, citing *Gifford vs. Travelers Protective Association*, 153 F.2d 209 (9th Circuit, 1946), Opposition Brief p. 11, for the proposition that Petitioner had the burden of proving, without any right to discovery of third party witnesses, evidence which would create a "genuine issue of material fact." But the Respondents ignore Petition APPENDIX E, showing that Magistrate Kronenberg ruled October 30, 1981 that Petitioner had good cause to

depose state court "referee" Joseph Wapner and deputy county clerks who could establish his felonious taking of the state court file in 1980; see Petition pp. 27, 28. Respondents present no legal authority countervailing that supporting the petition; therefore, it should be granted.

II. RESPONDENTS' FACTUAL ARGUMENTS

False statements of fact are contained in Respondents' Brief in Opposition to Petition for Writ of Certiorari, page 2, "Statement of the Case."

Because of the admitted personal bias and prejudice of J. Rittenband and J. Choate, Western District Los Angeles Superior Court, and facts presented to the Second Appellate District in Writ 2nd CIV 58870, the appeals court granted our writ and transferred the case away from the Western District. A third judge, J. Chernow, took himself off NWC76789, after proper challenge and grant of stay against him in consolidated case by the appeals court. Therefore, in the state case, of the six challenges for cause listed by Respondents, three were granted.

Respondents in-pro-per do not deny our charge of perjury against Patty Mortl,[3] p. 9

[3] Patty Mortl left HARRINGTON, FOXX, DUBROW & CANTER. Attorney Dale Goldfarb is a defendant herein.

of Petition. Nor do Respondents deny material facts presented in Petition pp. 4 through 9. Also, Respondents misquote from a questioned document, Opposition Brief p. 3, footnote 2, incorrectly attributing defendants' conduct to the Petitioner and his attorneys.[4] The Respondents fail to respond to our charge of felony made against retired judge Joseph Wapner, Petition pp. 8, 28. Joseph Wapner's acts, Petition p. 30, are not denied, not defensible, but are beneath minimum due process requirements. The Respondents ignore Petition pp. 29-33, which set forth defendants' corrupt conduct, while continuing their *ad hominem* argument.

"The outlandish proceedings in the state trial court" (Opposition Brief, p. 3) unconstitutionally deprived the Petitioner of his due process rights in NWC76789 by striking all

[4]Respondents improperly put photocopies of the incomplete depositions of Petitioner's attorneys into federal court; they are unsigned, never submitted, although we requested them repeatedly; therefore, they are not evidence under federal law.

of the Petitioner's expert testimony and evidence and defaulting the Petitioner. Petitioner's expert, world-renowned neurosurgeon J. DeWitt Fox, M.D., F.A.C.S., by proper affidavit controverted defendants' motion papers, concluded that Ada Crews Mann would be alive if the defendant doctors had treated her broken neck instead of drugging her after she fell in U.C.L.A. Hospital x-ray room November 1, 1977, that said failure to treat her broken neck proximately killed her. The Respondents now admit Petitioner's decedent fell November 1, 1977, Opposition APPENDIX p. 9, but evade and ignore Respondent Dr. Andrea Cracchiolo's continued denials that she fell November 1, 1977.

Petitioner's expert George Campion, M.D., referred to in Opposition Brief p. 4, in sworn declarations on file in state court declared decedent had a broken neck while she was under the treatment of the Respondent doctors. Defendants' corruption of this expert caused

him to cast doubt on his earlier declarations, Opposition APPENDIX p. 10: "...the fact that she can turn her neck for the positioning of skull x-rays..." Petitioner had no opportunity because of the Respondents' undenied due process violations, to ask Dr. Campion if a technician might have turned the decedent's neck while she was unconscious.[5]

Respondents fail to show why the within Petition should not be granted.

Respectfully submitted,

KENNETH CREWS MANN
BRUCE OGDEN MANN

Attorneys for Petitioner

[5]Defendants' [Respondents'] Campion deposition notice was for 1:30 p.m. August 10, 1981, but they held his deposition from 9 a.m. to 12:30 p.m. August 10, 1981, without Petitioners' attorneys present.

PROOF OF SERVICE

(F.R.C.P. Rules 19.3, 28.3)

I, Kenneth Crews Mann, one of the counsel of record for Zelvern W. Mann, Administrator of the Estate of Ada Crews Mann, hereby certify that, on the 12th day of October, 1983, I served one copy of the BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (a correction to space rule requirements of the same brief mailed October 6, 1983) on the law firm which is attorney of record, Respondent Dale B. Goldfarb, in pro-per, by mailing one copy in a duly addressed envelope, with first class postage prepaid to:

HARRINGTON, FOXX, DUBROW & CANTER, Attorneys Dale B. Goldfarb and Mark W. Flory, One Wilshire Building, Suite 703, Wilshire at Grand, Los Angeles, CA 90017. I also mailed one copy in a duly addressed envelope, with first class postage prepaid to THE NINTH CIRCUIT COURT OF APPEALS.* It is further certified that all parties required to be served have been served, and that the list of such parties (including defaulting judicial parties and non-judicial party Wapner) is set forth in the caption of the petition.

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